Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-586

EUGENE J. McCARTHY, ET AL, Petitioners

v.

DOLPH BRISCOE, ET AL, Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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October 21, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. ----------

EUGENE J. McCARTHY, ET AL[*], Petitioners

v.

DOLPH BRISCOE, ET AL, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 13, 1977.[1]

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[*] All Petitioners and Respondents are as follows: Eugene J. McCarthy, Paul Spragens, Ronald C. Engle, Janice Lindley Yeager, and James D. Clark, Petitioners; and Dolph Briscoe, Governor of Texas, and Mark W. White, Jr., Secretary of State of the State of Texas, Respondents.

CITATION TO ORDERS AND OPINIONS BELOW

The Order and Opinion of the three-judge district court entered September 2 and September 3, 1976, respectively, declaring Art. 13.50, Subdivision 1, of the Texas Election Code (Supp. 1975) unconstitutional is printed in Appendix 1 hereto, infra, page A-1, and are reported in 418 F. Supp. 819. The Order of the three-judge district court of September 7, 1976, denying Petitioner's Application for Stay is printed in Appendix 1 hereto, infra, page A-6. The Order of Mr. Justice Lewis F. Powell, Jr. as Circuit Justice for this court, entered September 14, 1976, denying Petitioner's Application for Injunctive Relief on jurisdictional grounds is printed in Appendix 2 hereto, infra, page A-17. The Order of the United States Court of Appeals, Fifth Circuit, on Application for a Partial Stay of Judgment and for Emergency Injunctive Relief, entered September 23, 1976, is printed in Appendix 1 hereto, infra, page A-7, and is reported in 539 F. 2d 1355 (1976). The Opinion entered June 13, 1977, and Order denying rehearing entered July 25, 1977, of the Court of Appeals, Fifth Circuit, is printed in Appendix 1 here-

to, infra, page A-16, and is reported in 553, F. 2d 1005.

The Order of Mr. Justice Lewis F. Powell, Jr., entered September 27, 1976, granting injunctive relief is printed in Appendix 2 hereto, infra, page A-19. The Opinion of Mr. Justice Lewis F. Powell, Jr., entered September 30, 1976, on granting injunctive relief is printed in Appendix 2 hereto, infra, page A-21.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 19, 1977. A timely petition for rehearing was denied on July 25, 1977, (Appendix 1, infra, page A-16) and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1

Whether a district court, upon finding a constitutional denial of Petitioner's rights by state officials under color of state law to be an '"intransigent and discriminatory position" and an "incomprehensible policy"" (a) should grant permanent injunctive relief requested, or (b) retain jurisdiction pending an opportunity for the state and its officials to voluntarily abandon such unconstitutional conduct.

2.

Whether Petitoners are entitled to attorneys fees pursuant to Title 42 USC Section 1973[1](e) or Title 42 USC Section 1988.

STATUTORY PROVISIONS

The statutory provisions involved are as follows:

Art. 13.50, Texas Election Code
Title 42 USC, Section 1973[1](e)
Title 42 USC, Section 1988

They are set forth in full in Appendix 2, infra, page A-32.

STATEMENT OF THE CASE

Art. 13.50 of the Texas Election Code (Supp. 1975), prescribed the only method by which independent candidates for public office could obtain positions printed on the general election ballot. Subdivision 1 as amended in 1975 of that article expressly excluded the offices of President, Vice-President, and Presidential Elector.

Petitioners brought the instant case in the district court prusuant to 28 USC Section 1343(3) and (4) and Section 2201, to enjoin Respondents from applying Art. 13.50, Texas Election Code (Supp. 1975), in a manner so as to deny Petitioner McCarthy's name on the 1976 general election ballot as an independent candidate for the office of President, and denying other Petitioners their right to vote for an independent candidate for the presidency of the

United States, and for permanent injunction against future application of Art. 13.50, The grounds for such suit were that the interpretation and application of Subdivision 1 of Art. 13.50 of the Texas Election Code (Supp. 1975), by Respondent was in irreconcilable conflict with the 1st and 14th Amendments to the United States Constitution as well as in conflict with and repugnant to Art. II, Section 1, Clauses 2 and 4 and Art. VI, Clause 2, of the United States Constitution and the 12th Amendment to the United States Constitution.[2]

This cause was heard in the district court on September 2, 1976, and on that date the district court entered an Order finding and declaring Art. 13.50, Subdivision 1, Texas Election Code (Supp. 1975), to be unconstitutional as it applied to independent candidates for the offices of President, Vice-President, and Presidential Elector, but denied injunctive relief. Thereafter, on September 3, 1976, the district court filed an opinion providing that Petitioners will take nothing by their suit and that each party will bear his own costs. (Appendix 1, infra, page A-1)

Petitioners sought emergency injunctive relief from the Circuit Justice of the United States Supreme Court and that relief was denied on September 14, 1976, on jurisdictional grounds. (Appendix 2, infra, page A-17)

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[2]Petitioners Engle and Spragens sought to be designated Presidential Electors pledged to the independent candidacy of Petitioner McCarthy.

After application for emergency injunctive relief to the Court of Appeals, Fifth Circuit, that court denied Petitioners relief on September 23, 1976. (Appendix 1, infra, page A-7)

Following the Court of Appeals denial of emergency injunctive relief, Petitioners again sought injunctive relief from the Circuit Justice of the United States Supreme Court, pending the filing of this petition and pursuant to that application, Mr. Justice Powell granted emergency injunctive relief on September 27, 1976, requiring Respondent Secretary of State White to place the name of Petitioner McCarthy on the 1976 general election ballot for the office of President of the United States as an independent candidate. (Appendix 2, infra, page A-19) On September 30, 1976, Mr. Justice Powell filed an opinion relative to the Order of September 27, 1976. (Appendix 2, infra, page A-21)

Petitioners thereafter pursued their appeal to the Court of Appeals for the Fifth Circuit seeking reversal of the judgment of the district court insofar as it failed to grant permanent injunctive relief against Respondents' interpretation and application of Subdivision 1, Art. 13.50, Texas Election Code (Supp. 1975) so as to exclude candidates or the offices of President, Vice-President, and Presidential Elector and requested the Court of Appeals to remand the case to the district court for entry of an Order providing such injunctive relief and for a hearing on attorneys fees as provided by 42 U.S.C. Section 1973[1](e).

After oral argument, the Court of Appeals affirmed the judgment of the district court. (Appendix 1, infra, page A-11) The basis upon which the Court of Appeals denied a remand and injunctive relief was a finding that "any possibility that the State of Texas will attempt to enforce the statute in any future presidential election is speculative at best". (Appendix 1, infra, page A-15)

The conclusion of the Court of Appeals was made in the face of the fact that Respondent White, the chief election officer of the state, was himself without any state statutory authority or federal injunctive direction upon which he could place an independent candidate for President, Vice-President, or Presidential Elector on the general election ballot of the State of Texas following the district court's declaration that Subdivision 1, Art. 13.50 of the Texas Election Code (Supp. 1975) was unconstitutional. In this regard the attorney for Respondent advised the Court of Appeals in oral argument that if "General Magnifico" were to seek a ballot position as an independent candidate for President, that Respondents would deny her the right to have her name placed on the ballot.[3]

Subdivision 1 of Art. 13.50 of the Texas Election Code (Appendix 3, infra,

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[3]Rules of the Court of Appeals for the Fifth Circuit provide for the transcription of oral argument for the use of judges only and such transcriptions are not available to counsel for parties.

page A-32) was amended more than a year after this Court's decision in Storer v. Brown 415 U.S. 724 (1974) and Lubin v. Panish 415 U.S. 709 (1974). Prior to the 1975 amendment to Art. 13.50 of the Texas Election Code it provided ballot access to independent candidates for President.

Petitioners timely filed Motion for Re-Hearing was denied on July 25, 1977. (Appendix 1, infra, page A-16)

REASONS FOR GRANTING THE WRIT

1

District courts should grant adequate permanent relief by injunction prohibiting unconstitutional conduct of state officials acting under color of state law upon evidence of such conduct or retain jurisdiction for additional relief if such becomes necessary in the future.

The district court, in its haste to deny Petitioners injunctive relief for the 1976 election failed even to address the question of injunctive relief for future elections and directed that "Plaintiffs take nothing by their suit and each party bear his own cost". (Appendix 1, infra, page A-5)

Upon the district court's declaration that Subdivision 1, Art. 13.50, Texas Election Code, was unconstitutional, Respondents Briscoe and White had no authority upon which to afford any independent candidate for the office of President a position on the Texas

general election ballot even if they were inclined to do so. There was no statutory procedure by which such an applicant for a position on the ballot could establish some reasonable criteria for such position, that is, a showing of serious candidacy and community support. Absent statutory authority and guidelines for a position on the ballot or injunctive direction by Federal judicial decree, Respondents were left without criteria to conform their action to allow or deny persons seeking ballot position as independent candidates for President of the United States. No criteria existed to distinguish between serious candidates such as Petitioner McCarthy and candidates of questionable seriousness such as "General Magnifico". It is, no doubt, this absence of criteria that caused the attorney for Respondent to, without hesitation, in reponse to an inquiry by one of the judges of the Court of Appeals at oral argument state that Respondents would not allow "General Magnifico" a position on the ballot as an independent candidate for President of the United States.

The conduct of the Respondents in denying constitutional rights to Petitioner until enjoined from so doing by the September 27, 1976, Order of Mr. Justice Powell, fully demonstrates that Petitioners were entitled to permanent injunctive relief, particularly when taken with the fact that Art. 13.50, Subdivision 1, Texas Election Code, was amended in 1975 so as to deny these Petitioners rights so clearly established by this court in 1974 in its

opinion in Storer v. Brown, supra, and Lubin v. Panish, supra. It was only after Petitioners pursued the claim for permanent injunctive relief to the Court of Appeals that the Texas Legislature enacted legislation providing ballot access to independent candidates for the offices of President, Vice-President, and Presidential Elector.

While it is in some instances appropriate for district courts to declare state statutes unconstitutional, and defer the granting of injunctive relief so as to afford the state the opportunity to conform their statutes to the United States Constitution, district courts in such instances hould retain jurisdiction to grant injunctive relief if the state fails to exercise such opportunity, rather than providing that "Plaintiffs will take nothing by their suit and each party will bear his own costs". (Appendix 1, infra, page A-6)

The Court of Appeals improperly placed the burden of showing future conduct of Respondents on Petitioners as a condition of granting future injunctive relief.

The Texas Legislature, after oral argument in the Court of Appeals adopted corrective legislation which may render the question of permanent injunctive relief moot. This was suggested by Petitioners in a post-argument motion. Under these circumstances the Court of Appeals should have remanded the case to the district court for further hearing on attorneys fees pursuant to Title 42 U.S.C.

Section 1973[1](e) and Title 42 U.S.C. Section 1988.

2.

Title 42 U.S.C. Section 1973[1](e) and Title 42 U.S.C. Section 1988 were designed to afford persons whose rights as guaranteed by the United States Constitution are abridged meaningful access to the judicial process to vindicate such rights. Termination of the unconstitutional practice after initiation of litigation should not defeat the right to an award of attorneys fees necessarily incurred to vindicate such rights. The finding by the Court of Appeals that future denial was "speculative at best" can hardly afford that Court the discretion of denying attorneys fees authorized under 42 U.S.C. Section 1973[1](e) and 42 U.S.C. Section 1988, to a party who has successfully vindicated his constitutional rights even if such vindication is the result of legislation brought about by the litigation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX I: OPINIONS BELOW

Eugene J. McCARTHY, et al.

v.

The Honorable Dolph BRISCOE, Governor, State of Texas, and the Honorable Mark White, Secretary of State of Texas.

Civ. A. No. A-76-CA-158.

United States District Court,

W. D. Texas,

Austin Division.

Judgment Sept. 2, 1976.

Opinion Sept. 3, 1976.

Before GEE, Circuit Judge, and SPEARS and WOOD, District Judges.

JUDGMENT

On this the 2nd day of September, 1976, came on for hearing at Austin, Texas, the above styled and numbered cause before the undersigned constituting a three-judge Court convened by authority of Honorable John R.Brown, Chief Judge, United States Court of Appeals for the Fifth Circuit; and the Court having considered the pleadings, briefs, stipulations, evidence, and ar-

guments of Counsel finds and concludes as follows:

(1) That Art. 13.50, Subdivision 1 of the Texas Election Code (Supp. 1975), as it applies to independent Candidates for the offices of President, Vice-president, and presidential elector, is unconstitutional.

(2) That there is insufficient time remaining before the general election begins on October 13, 1976, when absentee voting begins, in which to allow the Plaintiff to demonstrate substantial support in the community, and, thereafter, to afford the Secretary of State a reasonable opportunity to verify signatures on any petition(s) submitted and prepare the ballots, as required by the Texas Election Code. In this connection, Plaintiff has failed to show diligence in his efforts to have his name printed on the ballot in Texas, but, on the contrary, by reason of the late filing of this lawsuit (July 30, 1976) he has made it impractical, if not impossible, for this Court to grant him the relief sought without disrupting the entire election process in this state, which this Court is unwilling to do under the circumstances.

It is, therefore, Ordered, Adjudged and Decreed that Art. 13.50, Subdivision 1 (Supp. 1975), of the Texas Election Code, as it applies to President, Vice-president, and presidential elector, is hereby declared to be unconstitutional.

It is further Ordered, Adjudged, and Decreed that this Court is unwilling to allow Plaintiff's name to be printed on the ballot for the general election without a showing of substantial support in the community, and since the Plaintiff by his laches, has made it impractical, if not impossible, for this Court to grant him the alternative relief sought, such relief prayed for is hereby denied.

Nothing herein, of course, should be construed as adversely affecting Plaintiff McCarthy's right to conduct a write-in campaign pursuant to Art. 6.05, Subdivision 3, and Art. 6.06 of the Texas Election Code.

The Court reserves the right to later file an opinion expressing its views in greater detail.

OPINION

PER CURIAM:

Texas provides no means of access to its ballot for independent candidates for the offices of president, vice-president or presidential elector. Such aspirants are remitted to the organization of a new party (if they wish their names printed on the ballot) or to write-in campaigns.[1]

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[1]The Texas Election Code provisions for attaining ballot position by petitions demonstrating substantial community support was amended effective September 1,

1975 to deny their use specifically to such candidates, TEX. REV. CIV. STAT. ANN. art. 13.50, subdiv. 1 (Supp. 1976).

Storer v. Brown, 415 U.S. 724, 746(1974), clearly precludes the state from forcing a candidate to establish a political party to attain ballot position. It also indicates that unreasonably burdensome procedures for such candidates to obtain ballot position are constitutionally invalid. Here the procedures were not even unreasonably burdensome; there were none. Lubin v. Panish, 415 U.S. 709, 719 n.5 (1974), strongly reinforces the necessary inference from Storer that such a remission to a mere write-in campaign is not an acceptable alternative to reasonable procedures for obtaining ballot position. We hold that Texas Election procedures are constitutionally invalid for the failure noted, especially in view of their singling out three offices only from the mass for discriminatory treatment.

We regret, however, that for no sufficient reason the matter comes before us too late for us to fashion meaningful relief without substantially disrupting the entire Texas election scheme, which is already in process. The candidate's testimony is that limitations of time and resources simply did not permit him to get around to the matter sooner, and we have no reason to doubt its truth. But this circumstance was not occasioned by any fault of the state, which had early made its intransigent and discriminatory

position in the matter clear. Balancing the equities, and deploring the time limitations which compel us to choose between standing by and permitting this incomprehensible policy to achieve its apparent objective or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights, we conclude that injunctive interference by us at this late stage would not be warranted.

For the convenience of the parties and of the reviewing Court or Justice, we state our reasons briefly, thinking promptness more appropriate to the circumstances than exhaustiveness. Plaintiffs will take nothing by their suit, and each party will bear his own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CA A-76-CA-158

EUGENE A. McCARTHY, ET AL
VS.
DOLPH BRISCOE, ET AL

ORDER

On this day plaintiffs McCarthy, et al's Application for Stay was presented and after examination of said application, the undersigned is of the opinion that such stay should be in all things denied.

IT IS THEREFORE ACCORDINGLY ORDERED that plaintiffs McCarthy et al's Application for Stay of the Court order of September 2, 1976, be and it is in all things denied, including their application for stay of the order of September 2, 1976, pending appeal to the United States Supreme Court.

SIGNED this 7th day of September, 1976.

/s/ THOMAS GIBBS GEE
U.S. CIRCUIT JUDGE

EUGENE J. McCARTHY, et al.,
Plaintiffs-Appellants,

v.

DOLPH BRISCOE, Governor of Texas, et al.,
Defendants-Appellees

No. 76-3539

United States Court of Appeals
Fifth Circuit

Sept. 23, 1976

Appeal from the United States District Court for the Western District of Texas.

ON APPLICATION FOR A PARTIAL STAY OF JUDGMENT AND FOR EMERGENCY INJUNCTIVE RELIEF

Before GODBOLD, DYER and HILL, Circuit Judges.

PER CURIAM:

This suit was filed on July 30, 1976 by appellants against Dolph Briscoe, Governor of Texas and Mark W. White, Jr., Secretary of State of the State of Texas, seeking to have the name of Eugene McCarthy placed upon the November, 1976 general election ballot in Texas as an independent candidate for the presidency of the United States and declaring Paul Spragens and Ronald C. Engle electors pledged to the candidacy of McCarthy.

A three-judge district court was de-

signated and a trial of the case was had on September 2, 1976. The court declared Article 13.50 of the Texas Election Code unconstitutional as it applies to independent candidates for the offices of president, vice-president and presidential elector, and specifically as it applied to McCarthy. Neither immediate nor prospective injunctive relief was granted by the court. An application for stay was denied by the court and notice of appeal to the United States Supreme Court was filed September 7, 1976. On September 14, 1976, Mr. Justice Powell denied a partial stay of the district court's judgment and on September 16, 1976, a notice of appeal to this Court was filed.

An application for stay and emergency injunctive relief is sought based solely upon the failure of the district court to grant injunctive relief. In its judgment the district court found:

> "That there is insufficient time remaining before the general election begins on October 13, 1976, when absentee voting begins, in which to allow the plaintiff to demonstrate substantial support in the community, and, thereafter, to afford the Secretary of State a reasonable opportunity to verify signatures on any petition(s) submitted and prepare the ballots, as required by the Texas Election Code."

The court further found:

"By reason of the late filing of this law suit (July 30, 1976) he has made it impractical, if not impossible, for this Court to grant him the relief sought, without disrupting the entire election process in this state, which this Court is unwilling to do under the circumstances."

The court further said in its opinion:

"Balancing the equities, and deploring the time limitations which compel us to choose between standing by and permitting this incomprehensible policy to achieve its apparent objective, or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights, we conclude that injunctive interference by us at this late stage would not be warranted."

Although appellants assert that there is time to direct the placement of McCarthy's name on the ballot conditioned upon his satisfying some petition requirement designed by the Court to demonstrate community support, they neither suggest how this could be accomplished, now how we or the district court could formulate such a procedure that would be effective in time to carry out in an orderly way the preparation of the ballot and the conduct of the election. We are thus regretfully constrained to agree with the district court that because the complaint was so lately filed there is

insufficient time for a court to devise a petition requirement for ascertaining whether McCarthy has substantial community support in Texas without disrupting the entire election process in that state. Williams v. Rhodes, 1968, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24. See Hadnott v. Amos, 1968, 393 U.S. 904, 89 S.Ct. 1101, 22 L.Ed.2d 336.

The application for a partial stay of the district court's judgment of September 2, 1976 and for emergency injunctive relief is denied.

EUGENE J. McCARTHY, et al.,
Plaintiffs-Appellants,

v.

DOLPH BRISCOE, Governor of Texas, et al.,
Defendants-Appellees

No. 76-3539

United States Court of Appeals
Fifth Circuit

June 13, 1977

Rehearing Denied July 25, 1977.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH and MORGAN, Circuit Judges, and LYNNE*, District Judge.

OPINION

LYNNE, District Judge:

Plaintiff-Appellants brought this action pursuant to 42 U.S.C. §§ 1983 and 1985, and 28 U.S.C. §§ 1343(3)(4), 2201, 2281, and 2284 for injunctive and declaratory relief seeking annulment and interdicting future enforcement of Texas laws which prohibit electoral consideration of independent candidates for the

*Senior District Judge of Northern District of Alabama sitting by designation.

offices of President and Vice-Presient of the United States of America. The suit was filed July 30, 1976,[1] some three months prior to the 1976 presidential election, by presidential candidate Eugene J. McCarthy, two presidential elector candidates pledged to McCarthy, and two voter-supporters of McCarthy. Thereafter, McCarthy gave formal notice of his candidacy for President by filing with Texas' Secretary of State, appellee White,[2] a Declaration of Intent to Run as an Independent Candidate.

On September 2, 1976, a three-judge court[3] heard the case and adjudicated

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[1]The complaint was filed in the United States District Court for the Northern District of Texas. On August 6, 1976, the cause was transferred to the Western District.

[2]The other defendant-appellee is Texas Governor Dolph Briscoe.

[3]The hearing was before Circuit Judge Thomas Gibbs Gee and District Judges Adrian A. Spears and John H. Wood, Jr.

that Article 13.50(1)[4] of the Texas Election Code is unconstitutional as applied to presidential and vice-presidential candidates, but that McCarthy, having failed to show diligence in his efforts to have his name printed on the Texas ballot and by his late filing of the lawsuit, had made it impracticable, if not impossible, for the court to grant him the injunctive relief sought. Accordingly, the court did not order that McCarthy's name be included on the ballot. Plaintiffs have appealed from the denial of the permanent injunction.

On September 16, 1976, appellants appealed to this Court for a partial stay and emergency injunctive relief, which were denied on the ground that "the complaint was so lately filed there is insufficient time for a court to devise a petition requirement for ascertaining whether McCarthy has substantial com-

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[4]Article 13.50 (1) of the Texas Election Code provides: "This section applies to nonpartisan or independent candidates for federal, state, district, county and precinct offices in the general election provided for in Art. 2.01. A person may run as a nonpartisan or independent candidate for any such office, other than the offices of President, Vice-President, and Presidential elector, by complying with this section and other applicable provisions of this Code."

munity support[5] in Texas without disrupting the entire election process in that state." McCarthy v. Briscoe, 539 F.2d 1353, 1355 (5th Cir. 1976).

On September 24, appellants applied ex parte for injunctive relief to Mr. Justice Powell, Circuit Justice, who granted the application and ordered McCarthy's name to appear on the general election ballot in Texas as an independent candidate for the office of President of the United States in 1976. McCarthy v. Briscoe, ____ U.S. ____, 97 S.Ct. 10, 50 L.Ed2d 49 (1976). Such order was complied with.

This appeal raises the single contention that the three-judge court erred in failing to grant permanent relief enjoining future application of Article 13.50 of the Texas Election Code by denying independent candidates for President and Vice-President of the United States the right to have their names printed on the general election ballot in Texas. Appellants also seek an award of attorney's fees.

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[5]The validity of the "community support" requirement derives from Storer v. Brown, 415 U.S. 724, 746-47, 94 S.Ct. 1274, 39 L.Ed2d 714 (1974).

INJUNCTION DENIAL

A grant or denial of injunctive relief lies within the trial court's sound discretion. Frostie Company v. Dr. Pepper Company, 361 F.2d 124 (5th Cir. 1966). Injunctive remedy is discretionary and it is properly withheld when the controversy is not ripe for judicial resolution. Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).[6] In view of the three-judge court's ruling that the Texas election statute is unconstitutional as applied to presidential candidates, together with Mr. Justice Powell's order that required Mr. McCarthy to be listed on the 1976 ballot, any possibility that the State of Texas will attempt to enforce the statute in any future presidential election is speculative at best. This Court presumes that Texas Will not defy the holding of unconstitutionality in the absence of an injunction.

Moreover, a denial of injunctive relief at this stage would not subject appellants to any immediate or irrepar-

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[6]Although Abbott dealt with anticipatory review of federal administrative regulations, its warning against premature injunctions has been heeded outside the administrative realm, and is appropriate here. See, e.g., Broderick v. di Grazia, 504 F.2d 643 (1st Cir. 1974).

able injury. Whatever imminent hardship existed at the time this suit was filed has already been avoided by the injunction directed at the 1976 Texas ballot. Clearly, the three-judge court did not abuse its discretion by refusing to enjoin future application of a statute whose sanctions have not been set in motion and may never be enforced against the individuals on whose behalf relief is sought. See International Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1945).

ATTORNEY'S FEES

This Court is authorized, in its discretion, to allow a reasonable attorney's fee as part of the prevailing party's costs. 42 U.S.C.A. § 1988 (as amended by P.L. 94-559, § 2, Oct. 19, 1976). In view of appellant's lack of success on this appeal, the Court declines appellant's request for an attorney's fee.

The judgment appealed from is AFFIRMED.

ON PETITION FOR REHEARING
(July 25, 1977)

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX II: ORDERS & OPINION OF CIRCUIT JUSTICE LEWIS F. POWELL, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

NO. A-201

EUGENE J. McCARTHY, PAUL SPRAGENS
RONALD C. ENGLE, JANICE LINDLEY YEAGER,
and JAMES D. CLARK
Petitioners
V.

DOLPH BRISCOE, Governor of Texas,
and MARK W. WHITE, JR., Secretary of
State of the State of Texas
Respondents

OPINION
(September 14, 1976)

Mr. Justice Powell, Circuit Justice.

This application, for a partial stay of an order and judgment of a three-judge District Court for the Western District of Texas, reaches me during the summer recess of the Court. Following a practice utilized by other Justices and by myself on previous occasion, see, e.g., Graves v. Barnes, 405 U.S. 1201 (Opinion of Powell, J., in Chambers, 1972), I have consulted informally with each of my Brethren who was available.* Although no other Justice has partici-

pated in the drafting of this order, I am authorized to say that each of those consulted would vote to deny the application for the reason stated below.

In denying injunctive relief to petitioners, the three-judge District Court based its action not upon resolution of the merits of the constitutional claim presented (which it resolved in favor of petitioners) but upon the equitable doctrine of laches. I conclude, therefore, that direct appeal to this Court does not lie under 28 U.S.C. § 1253, MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975), and that the Court is without jurisdiction to grant the relief now requested. Accordingly, the application for a stay is denied, but without prejudice to the right of petitioners to seek relief in the Court of Appeals.

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*All members of the Court, save two who were not available, have been consulted.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

NO. A-247

EUGENE J. McCARTHY, PAUL SPRAGENS
RONALD C. ENGLE, JANICE LINDLEY YEAGER,
and JAMES D. CLARK
Petitioners

V.

DOLPH BRISCOE, Governor of Texas,
and MARK W. WHITE, JR., Secretary of
State of the State of Texas
Respondents

ORDER
(September 27, 1976)

Mr. Justice Powell, Circuit Justice

Treating Petitioners' application for a partial stay of an order and judgment of the United States Court of Appeals for the Fifth Circuit entered on September 23, 1976, as an application for an injunction pursuant to 28 U.S.C. § 1651 and Rules 50 and 51 of this Court, and upon consideration thereof.

It is ordered that the application be granted and that Mark W. White, Jr., Secretary of State of the State of Texas, place, or cause to be placed, the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of

President of the United States.*

An opinion will follow.

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*I have consulted informally with each of my Brethren and am authorized to say that a majority of the Court would grant the application. Mr. Justice White and Mr. Justice Rehnquist have asked to be recorded as holding a different view.

IN THE
SUPREME COURT OF THE UNITED STATES

NO. A-247

EUGENE J. McCARTHY, PAUL SPRAGENS
RONALD C. ENGLE, JANICE LINDLEY YEAGER,
and JAMES D. CLARK
Petitioners
V.

DOLPH BRISCOE, Governor of Texas,
and MARK W. WHITE, JR., Secretary of
State of the State of Texas
Respondents

OPINION
(September 30, 1976)

MR. JUSTICE POWELL, Circuit Justice.

This is an application for injunctive relief[1], presented to me as Circuit Justice. The applicants, former Senator

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[1]Although the application is styled "Application for a partial stay of an order and judgment of the United States Court of Appeals, Fifth Circuit," the applicants actually seek affirmative relief. I have therefore treated the papers as an application for an injunction pursuant to 28 U.S.C. § 1651 and Rules 50 and 51 of this Court.

Eugene J. McCarthy and four Texas voters who support Senator McCarthy's independent candidacy for President, have asked that I order Senator McCarthy's name placed on the 1976 general election ballot in Texas. They sought relief without success from a three-judge District Court for the Western District of Texas and, on appeal, from the Court of Appeals for the Fifth Circuit.[2] Upon consideration of the record before me, I have concluded that the courts below erred in failing to remedy a clear violation of the applicant's constitutional rights. I have therefore granted the requested relief.

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[2]The applicants filed an initial application in this Court for a stay of the District Court order on September 8, 1976, before they had filed an appeal to the Court of Appeals. In my capacity as Circuit Justice, I denied that request on September 14 on the ground that this Court was without jurisdiction to entertain a direct appeal from the District Court under 28 U.S.C. § 1253. See MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975). I specified that the denial was without prejudice to the applicant's right to seek relief in the Court of Appeals. The applicants filed a notice of appeal in the Court of Appeals on September 16; the Court of Appeals denied their request for interlocutory relief on September 23; and the applicants renewed their application here the following day.

Effective September 1, 1975, Texas amended its Election Code so as to preclude candidates for the office of President from qualifying for position on the general election ballot as independents. Acts of 1975, c.682, § 23, codified in Tex. Election Code, Art. 13.50, Subdiv. 1 (Supp. 1976). Before that date independent candidates for all offices had been able to gain access to the ballot by submitting a prescribed number of voter's signatures by a deadline several months in advance of the general election. Tex. Election Code, Arts. 13.50, 13.51 (1967); see American Party of Texas v. White, 415 U.S. 767, 788-791 (1974). Under the new law that method of qualifying for the ballot was carried forward for most offices, but not for the office of President.[3] A presidential candidate must now be a member of a political party as a precondition to securing a place on the ballot. An independent candidate can seek election as

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[3]Candidates for the offices of Vice-President and presidential elector are similarly excluded from qualifying as independents. Art. 13.50, Subdiv. 1 (Supp. 1976). Although two of the applicants are candidates for the office of presidential elector, they have not specifically sought relief with respect to their own candidates. My order of September 27 is sufficiently broad to encompass such relief as may be necessary to perfect Senator McCarthy's qualification for general election.

President only by joining or organizing a political party, Tex. Election Code Arts. 13.02, 13.45 (Supp. 1976), or by mounting a campaign to have his supporters "write in" his name on election day, id., Arts. 6.05, 6.06 (Supp. 1976).

On July 30, 1976, the applicants filed this suit in the District Court, claiming that Art. 13.50 of the Texas Election Code, as amended, violated the rights "secured to them under Article II, Section 1, Clauses 2 and 4, and Article VI, Clause 2 of the United States Constitution and the First, Twelfth and Fourteenth Amendments thereto." The applicants asked the court to order Senator McCarthy's name placed on the ballot, or, alternatively, to devise reasonable criteria by which Senator McCarthy might demonstrate support for his candidacy as a means of qualifying for ballot position. The applicants submitted affidavits that tended to show that Senator McCarthy was a serious presidential aspirant with substantial support in many States.

The Defendants, the Governor and Secretary of State of the State of Texas, denied that the new law was unconstitutional and claimed that Senator McCarthy was barred by laches from obtaining the injunctive relief he requested. In support of the laches claim, the defendants presented the affidavit and later the live testimony of Mark W. White, Jr., the Secretary of State, to the effect that it would be impossible in the time remaining before the November election for the State to verify that Senator

McCarthy had substantial support among Texas voters.

On September 2, 1976, the District Court held that the Texas law, as amended, was constitutionally invalid for failure to provide independents a reasonable procedure for gaining ballot access, but declined to enter injunctive relief. The court perceived its only choice to be one

> "between standing by and permitting this incomprehensible policy to achieve its apparent objective or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights...." Memorandum Opinion, at 2.

Believing it to be "too late for us to fashion meaningful relief without substantially disrupting the entire Texas election scheme," the court concluded that injunctive relief was not warranted. Ibid.

On September 23, 1976, the Court of Appeals denied the applicants request for emergency injunctive relief on the same basis:

> "We are...regretfully constrained to agree with the District Court that because the complaint was so lately filed there is insufficient time for the Court to devise a petition requirement for ascertaining whether McCarthy has substantial community support in Texas without disrupting the entire election process in that state...."

The following day, September 24, 1976, the applicants presented this application to me as Circuit Justice.

The new Texas law precluding independent candidates for President from gaining access to the general election ballot as independents raises no novel issue of constitutional law. In Storer v. Brown, 415 U.S. 724 (1974), the Court flatly rejected the notion that an independent could be forced to seek ballot position by joining or organizing a political party:

> "It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. Cf. American Party of Texas v. White, [415 U.S., at] 767. But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party

would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status...such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general elections? We think not." Id., at 745-746.

And in Lubin v. Panish, 415 U.S. 709 (1974) the Court characterized as "dubious at best" the intimation that a write-in provision was an acceptable means of ballot access:

> "The realities of the electoral process...strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot... That disparity would, itself, give rise to constitutional questions...." Id., at 719 n.5.

In view of these pronouncements, the District Court was fully justified in characterizing the new Texas law-enacted little more than a year after Storer and Lubin were decided-as demonstrating an "intransigent and discriminatory position" and an "incomprehensible policy."

Despite this recognition of the clear constitutional infirmity of the Texas statute, the District Court refused to grant the requested relief. The District Court, and the Court of Appeals, apparently assumed that the only appropriate remedy was to order implementation of the former statutory procedure permitting independent presidential candidates to demonstrate substantial support by gathering a prescribed number of voters' signatures-a procedure still available to independent candidates for most other elective offices. Since the signature-gathering procedure involved not only a filing deadline which had long since expired but also a lengthy process of signature verification, both lower courts concluded that there was too little time to impose a signature-gathering requirement without undue disruption of the State's electoral process.

This Court will normally accept findings of a district court, affirmed by a court of appeals, on factual considerations such as those underlying a determination of laches. But acceptance of findings of fact does not in this case require acceptance of the conclusion that violation of the applicants' constitutional rights must go unremedied. In

assuming that a signature-gathering process was the only available remedy, the courts below gave too little recognition to the amendment passed by the Texas Legislature making that very process unavailable to independent candidates for the office of President. In taking that action, the Texas Legislature provided no means by which an independent presidential candidate might demonstrate substantial voter support. Given this legislative default, the courts were free to determine on the existing record whether it would be appropriate to order Senator McCarthy's name added to the general election ballot as a remedy for what the District Court properly characterized as an "incomprehensible policy" violative of constitutional rights. This is a course that has been followed before both in this Court, see Williams v. Rhodes, 89 S.Ct. 1. (Opinion of STEWART, J., in-Chambers, 1968), and, more recently, in three District Court decisions involving Senator McCarthy, McCarthy v. Noel, No. 76-0402 (R. I. Sept. 24, 1976); McCarthy v. Tribbitt, No. 76-300 (Del. Sept. 16, 1976); McCarthy v. Askew, No. 76-1460-Civ-NCR (Fla. Sept. 15, 1976).

In determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access, a court should be sensitive to the State's legitimate interest in preventing "laundry list" ballots that "discourage voter participation and confuse and frustrate those who participate." Lubin v. Panish, supra, 415 U.S., at 715. But where a state forecloses independent

candidacy in presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support. See McCarthy v. Askew, supra, Memorandum Opinion, at 6.

It is not seriously contested that Senator McCarthy is a nationally known figure; that he served two terms in the United States Senate and five in the United State House of Representatives; that he was an active candidate for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary elections; and that he has succeeded this year in qualifying for position on the general election ballot in many States. The defendants have made no showing that support for Senator McCarthy is less substantial in Texas than elsewhere.

For the reasons stated, I have ordered that the application be granted and that the Secretary of State place the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of President of the United States.[4]

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[4]The order granting the application was issued on September 27, 1976. The Texas Election Code does not appear to prescribe a deadline for the printing of

I have consulted informally with each of my Brethren and, although no other Justice has participated in the drafting of this opinion, I am authorized to say that a majority of the Court would grant the application.[5]

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ballots for the general election. The earliest date when printed ballots are required for any purpose is October 13, 20 days before the election, when the statutory period for absentee voting by mail begins. Art. 5.05, Subdiv. 4(a) (Supp. 1974). Ballots are to be mailed to persons outside the United States "as soon as possible after the ballots become available, but not earlier than [October 3]," Art. 5.05, Subdiv. 4e, and to others intending to vote by mail on October 13 "or as soon thereafter as possible," Art. 5.05, Subdiv. 4(b). Political parties are not required to certify their nominees to the Secretary of State until September 28, Art. 11.04 (1967), and the Secretary of State is not required to certify the names of those who have qualified for ballot position to local election officials until October 3, Art 1.03, Subdiv. 2 (Supp. 1976). Thus there appears to be ample time to add Senator McCarthy's name.

[5]MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST have asked to be recorded as holding a different view.

APPENDIX III: STATUTORY PROVISIONS INVOLVED

1. Article 13.50, TEXAS ELECTION CODE (Supp. 1975)

Art. 13.50 Nonpartisan or independent candidate

Subdivision 1. This section applies to nonpartisan or independent candidates for federal, state, district, county, and precinct offices in the general election provided for in Section 9 of this code (Article 2.01, Vernon's Texas Election Code). A person may run as a nonpartisan or independent candidate for any such office, other than the offices of president, vice president, and presidential elector, by complying with this section and other applicable provisions of this code.

2. Title 42 U.S.C. Section 1973[1](e)

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

3. Title 42 U.S.C. Section 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil

rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action, or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court, U. S.
FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-586

* * *

EUGENE J. McCARTHY, ET AL.,
Petitioners

V.

DOLPH BRISCOE, ET AL.,
Respondents

* * *

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

* * *

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IN THE

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

* * *

Respondents, Dolph Briscoe, Governor of the State of Texas, and Mark White, formerly Secretary of State of the State of Texas, respectfully pray that the Petition for a Writ of Certiorari be in all things denied, and for grounds would show the following:

OBJECTIONS TO JURISDICTION OF THE COURT

The Court lacks jurisdiction of this case for two reasons:

(1) The case is moot; and

(2) There are no special or important reasons for granting the writ. Rule 19, Rules of the United States Supreme Court.

Since the filing of this lawsuit, the Texas Legislature has provided a means for independent candidates for the offices of President and Vice-President to secure a place on the ballot. Acts. 1977, 65th Leg., Ch. 240, p. 647 (Appendix A attached hereto). The fact situation existing at the time this suit was filed is not capable of repetition.

This suit was not filed as a class action. Petitioner McCarthy was placed on the ballot for the 1976 general election. He has not applied for a place on the ballot for the 1980 election. There is no case or controversy existing between Petitioners and Respondents and therefore the Court is required to dismiss. Constitution of the United States, article III; *The Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); and *see Sosna v. State of Iowa*, 419 U.S. 393 (1975).

STATEMENT OF THE CASE

The Statement of the Case contained in the petition is essentially correct as far as it goes. Certain relevant facts are, however, omitted.

Election Day 1976, was November 2. Absentee voting was scheduled by statute to begin on October 13, 1976. Petitioner McCarthy filed no intent to run as an independent candidate until August 25, 1976.

This suit was filed by Petitioners in July, 1976, in the wrong district and it was necessary for the case to be transferred from the Northern District of Texas to the Western District, which was accomplished by early August. Within two weeks of the transfer pretrial conferences between counsel had been held and a pretrial order (attached as Appendix B) was signed and agreed to on the 25th day of August, 1976,

approximately one week prior to the trial date of September 2nd.

The Respondent White, the chief election officer of the State of Texas, when asked what he would have done had an independent candidate for President made known his intention to run prior to the date for filing applications, answered that he would have referred the question to the Attorney General for advice and then would have taken some action based upon that advice. He never had that opportunity because Petitioners never requested a place on the ballot until August 25, 1976.

Petitioners assert that, prior to the 1975 Amendment to article 13.50 of Vernon's Texas Election Code, that article provided ballot access to independent candidates for President. The statement is completely inaccurate. The prior statute was never held to apply to the office of President or Vice-President. A similar statement in the opinion of Mr. Justice Powell rendered on September 30, 1976 (Appendix A-21 to the Petition), is no more correct. *American Party of Texas v. White*, 415 U.S. 767 (1974) which Mr. Justice Powell cites to support the statement dealt with the right of minority *parties* to secure a place on the ballot, not independent individuals.

In fact, the 1975 Amendment was part of an omnibus bill designed to clean up numerous provisions of the Election Code and was intended to make the Code expressly reflect what the law had been for some time, i.e., that article 13.50 did not apply to the offices of President and Vice-President. Acts 1975, 64th Leg., Ch. 682, p. 2080, § 23 (attached as Appendix C).

Mr. Justice Powell's mistake is understandable since he granted Senator McCarthy a place on the ballot

without ever affording the State of Texas or these Respondents an opportunity to respond to the Petitioner's application for a stay.

Mr. Justice Powell did, however, order Senator McCarthy placed on the ballot as an independent candidate for President and his order was obeyed. Senator McCarthy was on the ballot throughout the State of Texas and was able to garner no more than 20,000 votes of the 4 million cast in Texas for the office of President, something less than one half of one percent of the vote, and little more than an independent candidate for statewide office would have been required to show as a demonstration of community interest in his candidacy under article 13.50.

REASONS FOR DENYING WRIT OF CERTIORARI

(1) There is No Case or Controversy Between Petitioners and Respondents and, Should This Court Grant the Writ, There is No Meaningful Relief Which May be Ordered.

This suit was not filed as a class action. It is a suit on behalf of the Petitioners seeking a place on the 1976 ballot. As stated in the pretrial order, the relief requested was (1) a declaratory judgment; (2) injunctive relief either directing Respondents to place Petitioners' names on the ballot as independent candidates or to establish criteria for placing their names on the ballot; and (3) that the Court enjoin Respondents from giving any force or effect to article 13.50 of the Election Code.

The question presented here, according to the Petition, is whether the district court "should grant permanent injunctive relief requested, or . . . retain jurisdiction pending an opportunity for the State and its officials to voluntarily abandon such unconstitutional

conduct." Since Texas now does provide a means for independent candidates for President and Vice-President to have their names placed on the ballot, it would be a step backward to enjoin one State from giving force or effect to article 13.50, the only means for independent candidates for offices other than President and Vice-President to secure a place on the ballot.

None of the Petitioners is presently a candidate for any office. There is no present case or controversy between them and Respondents. In *Steffel v. Thompson*, 415 U.S. 452 (1974), this Court said:

> "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. . . ."
> (415 U.S. at 459, Fn. 10)

See also DeFunis v. Odegaard, 416 U.S. 312 (1974); *Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975).

When this contention was raised in the Court of Appeals Petitioners countered with the doctrine of "capable of repetition, yet evading review" and cited *Storer v. Brown*, 415 U.S. 724 (1974). Even though *Storer* differs from *DeFunis* and *Board of School Commissioners of the City of Indianapolis* in that there was no class action, nevertheless in *Storer* and in the cases upon which it relied, the questions decided were viable and would affect future candidacies, even future candidacies of the plaintiffs themselves.

Nothing this Court can do in this case will affect any future candidacy unless the Court accedes to Petitioners' demands that article 13.50 be declared unconstitutional, in which event, except for candidates for President and Vice-President, there would be no

vehicle in Texas for an independent candidate to get on the ballot.

The suit is moot and there is no existing case or controversy between Petitioners and Respondents sufficient to confer jurisdiction on this Court at this time.

(2) Article 13.50 of Vernon's Texas Election Code Was Not and is Not Now Unconstitutional.

Article 13.50 of the Election Code never was intended as a vehicle for independent candidates for President or Vice-President to secure a place on the ballot. It never has been used for that purpose.

If anything was unconstitutional, it was the fact that no Texas statute provided a means for an independent candidate for President or Vice-President to get on the ballot. Certainly article 13.50 should not be condemned simply because it did not accomplish all things within the terms of one statute.

The recent enactment of the Texas Legislature providing a means for independent candidates for President and Vice-President to get on the ballot does not amend article 13.50. It remains intact. Yet, the reasons given by Mr. Justice Powell and the courts below for stating that it was unconstitutional no longer exist. Article 13.50 is not unconstitutional and it would be error for the courts to hold that it is.

The issue presented by this suit is moot and there is no meaningful relief which can be granted. Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Respondents' Brief in Opposition to the Petition for a Writ of Certiorari has been placed, postage prepaid, in the United States First Class Mail on this the ____ day of November, 1977, addressed to Mr. Don Gladden, Attorney for Petitioners, 702 Burk Burnett Building, Forth Worth, Texas, 76102.

DAVID M. KENDALL

APPENDIX A

PRESIDENTIAL ELECTORS—QUALIFICATIONS

CHAPTER 240

S. B. No. 1150

An Act relating to the qualifications, nomination, election, and service of presidential electors; amending the Texas Election Code by amending Subdivision 4 of Section 61, as amended, Section 170, Section 171, as amended, and Section 172 (Articles 6.05, 11.01, 11.02, and 11.03, Vernon's Texas Election Code), and by adding Sections 170b and 170c; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Section 170, Texas Election Code, as amended (Article 11.01, Vernon's Texas Election Code), is amended to read as follows:

"170. Time of election; qualifications of electors

"Subdivision 1. On the first Tuesday after the first Monday in November in the year 1980 and every four years thereafter, there shall be elected by the voters of the State as many electors for President and Vice-President of the United States as the State of Texas may at that time be entitled to elect.

"Subdivision 2. Each elector at the time of nomination as a presidential elector candidate, at the time of election, and at the time of the convening of the electors must be a registered, qualified voter of this state and must not hold the office of senator or representative in

congress, or any office of trust or profit under the United States."

Sec. 2. The Texas Election Code, as amended, is amended by adding Section 170b to read as follows:

"170b. Independent candidate for president

"Subdivision 1. Any person eligible to hold the office of President of the United States may have his name and the name of a vice-presidential running mate printed on the ballot as independent candidates in the presidential race by complying with the provisions of this section.

"Subdivision 2. A person desiring to become an independent candidate for president shall file with the Secretary of State, not later than the second Monday in July before the general election at which his name will appear on the ballot:

"(1) an application to have his name and the name of an eligible vice-presidential candidate as his running mate printed on the ballot on a form prescribed by the Secretary of State;

"(2) the signed written consent of the person designated as the vice-presidential candidate to have his name printed on the ballot in that capacity;

"(3) a list of the names and addresses of persons to represent the applicant as presidential elector candidates in the number to be elected, together with the signed written consent of each such person to become a candidate; and

"(4) a petition of voters signed by qualified voters of the state in a number equal to not less than one percent of the entire vote of the state cast for president and vice-president at the last preceding presidential general election.

"Subdivision 3. A petition may not be circulated for signatures until after the date of general primary election in that election year, and any signature obtained on or before that date is void. A voter who voted in the general primary of any political party that held a presidential primary that year is ineligible to sign the petition of an independent candidate for president. The following statement shall appear at the head of each page of a petition: 'I certify that I did not vote this year in the general primary election of any political party that held a presidential primary.'

"Subdivision 4. The Secretary of State shall prescribe the form for the petition of voters to be filed by an independent candidate for president. For each signer the petition shall show the signer's address, the county of issuance and number of his voter registration certificate, and the date of signing. The petition may be in multiple parts. To each part shall be attached an affidavit of the person who circulated it, stating that he witnessed the affixing of each signature, that he called the attention of each signer to the statement at the head of the page before the person signed the petitioned (sic), that the correct date of signing is shown on the petition, and that to the best of his knowledge and belief each signature is the genuine signature of the person whose name is signed. A petition so verified is prima facie evidence that the signatures thereon are genuine and that the persons signing it are registered voters."

Sec. 3. The Texas Election Code, as amended, is amended by adding Section 170c to read as follows:

"170c. Write-in candidate for president

"Subdivision 1. Any person eligible to hold the office of President of the United States may become a write-in candidate for the office by complying with the provisions of this section. No write-in vote cast for the

office may be counted unless the person whose name is written in has complied with these requirements. The Secretary of State shall certify to the county clerks the names of write-in candidates who have complied with this section at the same time that he certifies the names of the presidential candidates to be printed on the ballot.

"Subdivision 2. A person desiring to become a write-in candidate for president shall file with the Secretary of State, not later than the 45th day before the general election:

"(1) a declaration that he is a write-in candidate for the office of president;

"(2) the name of an eligible vice-presidential candidate as his running mate and the signed written consent of that person to the candidacy; and

"(3) a list of the names and addresses of persons to represent the write-in presidential candidate as presidential elector candidates in the number to be elected, together with the signed written consent of each such person to become a candidate."

Sec. 4. Section 171, Texas Election Code, as amended (Article 11.02, Vernon's Texas Election Code), is amended to read as follows:

"171. Effect of votes for presidential candidates

"A vote for the set of candidates of any political party or for a set of independent or write-in candidates for both President and Vice-President of the United States shall be conclusively deemed to be a vote for the presidential elector candidates representing that party or that set of independent or write-in candidates, and shall be so counted and recorded for such electors as the state shall be empowered to elect. No vote shall be

counted unless the voter has cast his vote for both the candidate for President and the candidate for Vice-President of the same political party or set of independent candidates. A ballot on which a voter has written in the name of a presidential candidate who has filed a declaration of write-in candidacy in accordance with this section shall be counted as a vote for the presidential elector candidates representing that write-in candidate, regardless of whether the name of the corresponding vice-presidential candidate is written in."

Sec. 5. Section 172, Texas Election Code (Article 11.03, Vernon's Texas Election Code), is amended to read as follows:

"172. Canvass of votes and returns

"The canvass of the votes for candidates for President and Vice-President of the United States and the returns thereof shall be a canvass and return of the votes cast for the electors of the same party or set of independent or write-in candidates, respectively, and the certificate of such election made by the Governor shall be in accord with such return."

Sec. 6. Subdivision 4, Section 61, Texas Election Code, as amended (Article 6.05, Vernon's Texas Election Code), is amended to read as follows:

"Subdivision 4. When presidential electors are to be voted upon, their names shall not appear on the official ballot, but the names of the candidates for president and vice-president, respectively, of the political parties shall appear at the head of their respective tickets, printed as one race, and the names of each set of independent candidates for president and vice-president, printed as one race, shall be printed at the head of the independent column in the order determined under Subdivision 3 of

Section 61c of this Code (Article 6.05c, Vernon's Texas Election Code). The votes for presidential candidates shall be canvassed, counted, and returns made in accordance with Section 171 and Section 172 of this Code (Articles 11.02 and 11.03, Vernon's Texas Election Code)."

Sec. 7. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

* * * * * * * *

EUGENE J. McCARTHY, Plaintiffs	)	
V.	)	CIVIL ACTION NO. A-76-CA-158
DOLPH BRISCOE, EL AT Defendants	)	

* * * * * * * *

PRE-TRIAL ORDER

* * * * * * * *

A conference of attorneys as required by Rule 26 (g) of the Local Rules was held in the above entitled and numbered case in the city of Austin on the 25th day of August, 1976. Don Gladden appeared as counsel for the plaintiffs and Elizabeth Levatino, Assistant Attorney General of the State of Texas, appeared as counsel for defendants Dolph Briscoe and Mark White.

I.

JURISDICTIONAL QUESTIONS

No jurisdictional questions are raised by defendants.

II.

PENDING MOTIONS AND QUESTIONS RAISED THEREIN

Plaintiffs have filed a Motion for Summary Judgment based upon the pleadings and affidavits attached thereto.

III.

PLAINTIFFS' CLAIMS

1. Factual Claims

Plaintiff Eugene McCarthy is an independent candidate for president of the United States of America. Plaintiffs Spragens and Engle seek the office of presidential elector pledged and committed to the election of the plaintiff McCarthy as president of the United States. Plaintiffs Yeager and Clark seek to vote for plaintiff McCarthy for president. Plaintiffs contend that plaintiff McCarthy is a serious candidate for this office and that the statutes and laws of the State of Texas as applied by defendants have unconstitutionally discriminated against him and his candidacy in that there are no provisions under the laws of the State of Texas upon which he may have his name printed on the November 1976 general election ballot for the office of president of the United States. He says that candidates for president of the United States who are nominated or selected by a political party are entitled to have their names printed upon the general election ballot upon a certification by such political party of their names not later than September 28, 1976. Plaintiffs' (sic) claim that unless injunctive relief is granted herein that defendants will refuse to allow plaintiff McCarthy's name to be printed upon the November general election ballot. Plaintiff McCarthy further claims that the opportunity

for a voter to write-in his name is not equal protection under the law and that the opportunity afforded voters to write-in his name in Texas, if it is available, is not "an acceptable alternative" to having his name printed on the ballot as will be the nominees of political parties for the office of president.

2. Legal Claims

(a) Jurisdiction is conferred upon this Court by 28 USC 1343 (3) (4); 28 USC 2201; 28 USC 2284; 42 USC 1983; and 42 USC 1985.

(b) That the provisions of Article 13.50, Subdivision 1, of the Texas Election Code preclude plaintiff McCarthy from an opportunity to appear on the ballot as an independent candidate for president of the United States and that all other laws applicable to the election process in Texas are predicted upon that preclusion. That such preclusion is a denial by the defendants and the State of Texas of constitutional rights secured to plaintiffs as well as an unlawful deprivation and infringement of those rights secured to them under Article II, Section 1, Clauses 2 and 4, and Article VI, Clause 2 of the United States Constitution and the First, Twelfth and Fourteenth Amendments thereto.

(c) That there is no compelling state interest which would authorize or require the prohibition of independent candidates for president, vice-president, or presidential elector from having their names printed and appearing on the general election ballot.

(d) There are no applicable provisions of the Texas Election Code prescribing a manner in which plaintiff McCarthy may act to appear upon the general election ballot for 1976 as an independent candidate for president of the United States.

(e) There are no applicable provisions of Texas law limiting or conditioning in any manner, in support of a compelling state interest, the right of plaintiff McCarthy to have his name printed on the ballot except the tacit prohibition of Article 13.50, subdivision 1, of the Texas Election Code.

IV.

RELIEF REQUESTED

1. Preliminary

That a three-judge court be convened to hear this cause.

2. Declaratory

That Article 13.50 of the Texas Election Code be declared unconstitutional insofar as it prohibits the appearance and printing of the names of independent candidates for president and vice-president on the general election ballot and their designation of presidential electors pledged and committed to their candidacy.

3. Injunctive

(a)(i) The plaintiffs request this Court to direct the defendants Dolph Briscoe, Governor, and Mark White, Secretary of State, and their successors in office to place the name of Eugene McCarthy together with this designated candidate for vice-president upon the general election ballot for 1976 as independent candidates for president and vice-president and further that they accept his designation of plaintiffs Spragens and Engle as well as other persons as presidential electors committed to him for the office of president of the United States.

(a)(ii) In the alternative, plaintiffs request that this Court establish reasonable criteria considering the time frame now in existence upon which plaintiff McCarthy may establish support for his candidacy in the State of Texas and direct that upon his satisfying this criteria that the defendants Dolph Briscoe, Governor, and Mark White, Secretary of State, and their successors in office be directed to place the name of Eugene McCarthy together with his designated candidate for vice-president upon the general election ballot for 1976 as an independent candidate for president and further that they accept his designation of plaintiffs Spragens and Engle as well as other persons as presidential electors committed to him for the office of president of the United States.

(b) That plaintiffs request this Court to enjoin both the defendants and their successors in office from giving any force, effect or validity to Article 13.50 of the Texas Election Code which would deny independent candidates for president and vice-president from having their name printed on the general election ballot for those offices or deny them the right to designate presidential electors pledged to their candidacy.

V.

DEFENDANTS CLAIMS

1. Factual Claims

Plaintiff McCarthy made no attempt to have his name printed on the 1976 General Election ballot prior to the filing of this lawsuit. He at no time prior to August 25, 1976 contacted the Secretary of State seeking to file a declaration of intent to seek the office of the President of the United States, nor did he submit any indication of community support for such candidacy by way of party nomination or of nominating petitions containing

signatures of qualified voters who support his candidacy. Neither Defendant Briscoe nor White have ever been requested to place Plaintiff McCarthy's name on the 1976 General Election ballot, nor has either Defendant Briscoe or White ever declined to place Plaintiff McCarthy's name on the 1976 General Election ballot.

For an independent candidate for a state-wide office to have his name printed on the ballot, Article 13.50, Texas Election Code, requires the submission to the Secretary of State of a petition containing signatures of qualified voters who have not previously voted in a party primary equal to one percent of the vote cast for Governor in the last preceding gubernatorial general election or 16,550 signatures. These signatures must be verified by the Secretary of State's Office. Verification requires a minimum of 20 working days per each petition submitted. The actual printing of the ballot for the General Election requires at least 30 days. Absentee voting for the 1976 General Election begins on October 13, 1976. In order to verify and certify petitions and print ballots for the 1976 General Election, a petition requiring 16,550 signatures must be submitted no later than August 12, 1976.

Every ballot used in the 1976 General Election must contain a place for a write-in vote of the voters' choice for each office which appears on the ballot, including the office of President of the United States. The names of presidential electors do not appear on the ballot in Texas.

2. Legal Claims

(a) Plaintiff McCarthy is barred by laches from obtaining the equitable injunctive relief he seeks.

(b) The State of Texas is not constitutionally required to provide that independent candidates for the Office of President and Vice President of the United States be printed on a general election ballot.

(c) Independent candidates for President and Vice President of the United States have a constitutionally acceptable method of access to the ballot in Texas by the write-in procedure. Such votes are counted and presidential electors for such write-in candidates can be designated.

(d) The State of Texas has a compelling state interest in insuring significant community support for candidates whose names appear on the General Election ballot, through a party nomination or a petition containing names of persons supporting the candidate.

3. Relief Requested

Defendants request that this Court deny Plaintiffs the equitable injunctive relief which they seek.

VI.

EXHIBITS AND STIPULATIONS THERETO

1. Plaintiffs' Exhibits

(a) It is hereby agreed and stipulated as to plaintiffs' exhibit #1 attached hereto, an affidavit of plaintiff Eugene McCarthy together with the attachment thereto, that if Eugene McCarthy were present and testifying that he would testify under oath as to all facts contained therein as of the date of the execution of such affidavit and that such plaintiffs' exhibit no. 1 may be admitted into evidence subject to the objections of defendants hereinafter made.

(b) It is hereby agreed and stipulated as to plaintiffs' exhibit #2 attached hereto, the declaration of intent to run as an independent candidate of Eugene McCarthy which was on August 25, 1976, delivered to defendant White in his official capacity as Secretary of State, that if Eugene McCarthy were present and testifying that he would testify under oath as to all facts contained therein and that such plaintiffs' exhibit no. 2 may be admitted into evidence subject to the objections of defendants hereinafter made.

(c) It is hereby agreed and stipulated as to plaintiffs' exhibit #3 attached hereto, the affidavit of Mary Meehan, that if Mary Meehan were present and testifying that she would testify under oath as to all facts contained therein and that such plaintiffs' exhibit #3 may be admitted into evidence subject to the objections of defendants hereinafter made.

(d) It is hereby agreed and stipulated as to plaintiffs' exhibit #4 attached hereto, the affidavit of Ronald C. Engle, that if Ronald C. Engle were present and testifying that he would testify under oath as to all facts contained therein and that such plaintiffs' exhibit #4 may be admitted into evidence subject to the objections of defendants hereinafter made.

(e) It is hereby agreed and stipulated as to plaintiffs' exhibit #5 attached hereto, the affidavit of Paul Spragens, that if Paul Spragens were present and testifying that he would testify under oath as to all facts contained therein and that such plaintiffs' exhibit #5 may be admitted into evidence subject to the objections of defendants hereinafter made.

(f) It is hereby agreed and stipulated as to plaintiffs' exhibit #6 attached hereto, the affidavit of James D. Clark, that if James D. Clark were present and

testifying that he would testify under oath as to all facts contained therein and that such plaintiffs' exhibit #6 may be admitted into evidence subject to the objections of defendants hereinafter made.

2. Defendants' Exhibits

(a) It is hereby agreed and stipulated as to defendants' exhibit #A attached hereto, the affidavit of Mark White, Jr., that if Mark White, Jr., were present and testifying that he would testify under oath as to all facts contained therein and that such defendants' exhibit #A may be admitted into evidence subject to the objections of plaintiffs hereinafter made.

VII.

OBJECTIONS TO EXHIBITS AND STIPULATIONS THERETO

1. Objection of Defendants

(a) Exhibit 1, Affidavit of Eugene McCarthy.

Defendants agree without admitting the statements contained therein that Plaintiffs' Exhibit 1 may be offered into evidence with the following objections:

(i) Defendants object to the statement contained in Paragraph 7 that "the attached list, current as of the date shown at the end of it, shows that I have already complied with petition requirements of 12 states," on the grounds that it is inconsistent with the attached schedule and a conclusion that all petition requirements have been met. No facts are asserted that the number of signatures submitted were verified as meeting other qualifications such as registered voters, having voted in other primaries.

(ii) Defendants object to the statement in Paragraph 7 that "it is reasonable to expect that my campaign will be equally successful in gaining ballot status in most other states (and the District of Columbia) which provide for petitions," on the grounds that it is speculatory, conclusatory and not based on facts contained in the Affidavit or attached schedule. The schedule indicates that it is highly questionable as to whether or not Plaintiff McCarthy can obtain the requisite number of signatures by the filing deadlines in at least 25 of the states listed for campaigns in progress or petition campaign schedule.

(iii) Defendants object to Paragraph 9 on the grounds that it is hearsay, there are no facts contained therein showing upon what basis the poll was conducted. If the statement is offered for the proof of substantial community support, Defendants object on the grounds of hearsay and no reference to any findings in the State of Texas.

(iv) Defendants object to the statement in Paragraph 10 that "I expect to be on the ballot in at least 45 states" for the same reasons set out in (ii) above.

(b) Exhibit 3, Affidavit of Mary Meehan

Defendants agree without admitting the statements contained therein that Plaintiffs' Exhibit 3 may be offered into evidence subject to the following objections:

(i) Defendants object to the statement in Paragraph 3 of Plaintiffs' Exhibit 3, the affidavit of Mary Meehan, that "although we must also challenge discriminatory laws in several states," on the grounds that it is a conclusion and inflamatory (sic). Defendants further object to the statement in Paragraph 3 that "we expect Mr. McCarthy's name to be on the November ballot in all of them . . . we expect to obtain ballot

status in about 45 states" in that the statements are a conclusion and speculation, not based on any facts in the record and in conflict with evidence submitted with the affidavit of Eugene McCarthy, Plaintiffs' Exhibit 1.

(c) Exhibits 2, 4, 5 and 6.

Defendants agree without admitting the statements contained therein that Plaintiffs' Exhibits 2, 4, 5 and 6 may be offered into evidence subject to the following objections:

(i) Defendants object to any statements contained therein which are conclusions on the part of the affiant.

2. Plaintiffs' Objections

(a) Plaintiffs agree without admitting the statements contained therein that Defendants' Exhibit A may be offered into evidence subject to the following objections:

(i) Plaintiffs object to any statements contained therein which are conclusions on the part of the affiant.

VIII.

FACT STIPULATIONS

1. That Defendant Dolph Briscoe is the Governor of the State of Texas and as such is the Chief Executive Officer of the State of Texas.

2. That Defendant Mark White is the Secretary of State of the State of Texas and as such supervised the

certification of the ballot to be put before the voters in the November 1976 General Election. Defendant Briscoe certifies the election of presidential electors pursuant to Article 11.03, Texas Election Code.

3. That Plaintiff McCarthy is a registered voter in the State of Minnesota and is now a candidate for President of the United States with no party affiliation; that he is over 35 years of age and is a life-long citizen and resident of the United States of America.

4. In applying the provisions of Article 13.50 of the Texas Election Code, the Secretary of State applies said provisions to all portions of the State as it relates to the General Election ballot.

5. That Plaintiffs Exhibit 2, Declaration of Intent to Run as an Independent Candidate, has been filed by Eugene J. McCarthy on August 25, 1976, with the office of Defendant White, Secretary of State, and that such declaration is the only instrument filed by any of the Plaintiffs and is the only effort made by Plaintiff McCarthy or any party hereto to gain placement on the November 1976 General Election ballot, other than the filing and maintenance of this suit.

X.

OTHER STIPULATIONS

1. It is agreed that there is no necessity for a pretrial conference as required by Local Rule 26(a) and the parties request the Court to approve these stipulations and to waive the requirement of a pretrial conference.

2. It is agreed by the parties that this case will be submitted to the Court upon the foregoing stipulations of facts and the affidavits attached hereto and that the only witness contemplated to be called by either party is

the Defendant Mark White, who may be called by either Plaintiffs or Defendants. No other oral testimony is contemplated at this time by either party, but both parties reserve the right to call witnesses if necessary.

SIGNED THIS 2ND DAY OF SEPTEMBER, 1976.

/s/ Adrian A. Spears

United States District Judge

APPROVED BY:

/s/ Don Gladden

DON GLADDEN
Attorney for Plaintiffs

/s/ Elizabeth Levatino

ELIZABETH LEVATINO
Attorney for Defendants

APPENDIX C

ELECTIONS—CONDUCT—VOTING QUALIFICATIONS—INCIDENTAL MATTERS

CHAPTER 682

S. B. NO. 1047

An Act relating to the conduct of elections, the qualifications for voting, and procedures and matters incidental to the holding of elections in this state; containing criminal penalties; amending the following sections of the Texas Election Code, as amended: Section 5 (Article 1.05, Vernon's Texas Election Code), relating to eligibility for public elective office; Section 33 (Article 5.01), relating to disqualifications for voting; Section 34 (Article 5.02), relating to qualifications and requirements for voting; Subdivisions 1, 2, 3a, 3b, 4, 6(a) and (b), and 15, Section 37 (Article 5.05), relating to absentee voting; Section 37b (Article 5.05b), relating to voting by former residents in presidential elections; Section 37b (Article 5.05b), relating to records of voting by persons lacking full voting rights; Section 57 (Article 6.01), relating to placement of names of candidates on the official ballot for an election; Section 61b (Article 6.05b), relating to the order of party columns on the ballot; Subdivisions 2 and 2a, Section 63 (Article 6.07), relating to the publication of notices on proposed constitutional amendments; Paragraph (c), Section 18 of Section 79 (Article 7.14), relating to preparation of the returns where voting machines are used; Section 15 of Section 79 (Article 7.14), Subdivision 14 of Section 80 (Article 7.15), Section 95 (Article 8.13), and Section 330 (Article 15.30), relating to assistance to voters in

preparing their ballots; Section 4 of Section 224a (Article 13.47a), Section 227 (Article 13.50), and Section 229 (Article 13.52), relating to filing procedures for certain independent candidates; Subdivision 2, Section 222 (Article 13.45), relating to nominations by certain minor parties; and Section 231 (Article 13.54), relating to the nominating procedures for a party without state organization; amending the Texas Election Code by adding the following new sections: Section 8b, relating to verification of petition signatures; Section 246A, relating to misleading use of office titles in political advertising; repealing the following sections of the Texas Election Code: Section 37a (Article 5.05a), relating to voting by new residents of the state in presidential elections; Section 39 (Article 5.07), relating to residence requirements and other qualifications for voting in city elections; Subsection (m), Section 40 (Article 5.08), relating to the residence of persons under 21 years old; Subdivision 1, Section 222a (Article 13.45a), relating to management of party affairs of certain political parties; Section 223 (Article 13.46), relating to nomination procedures for certain minor parties; and Section 3, Section 224a (Article 13.47a), relating to candidacy procedures for certain independent candidates; also repealing Chapter 793, Acts of the 62nd Legislature, Regular Session, 1971 (Article 1.05-1, Vernon's Texas Election Code), relating to eligibility for elective municipal offices; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Section 5, Texas Election Code, as amended (Article 1.05, Vernon's Texas Election Code), is amended to read as follows:

"5. Ineligibility

"Subdivision 1. No person shall be eligible to be a candidate for, or to be elected or appointed to, any public elective office in this state unless he is a citizen of the United States eligible to hold such office under the Constitution and laws of this state, is not mentally incompetent as determined by a court, has not been convicted of a felony for which he has not been pardoned or had his full rights of citizenship restored by other official action, and will be 18 years of age or older on the commencement of the term to be filled at the election or on the date of his appointment, and unless he will have resided in this state for a period of 12 months next preceding the applicable date specified below, and for any public office which is less than statewide, shall have resided for six months next preceding such date in the district, county, precinct, municipality or other political subdivision for which the office is to be filled:

"(1) For a candidate whose name is printed on the ballot for a general (first) primary election, the applicable date is the last day on which any candidate for the office involved could file his application to have his name printed on the ballot for that primary election.

"(2) For an independent or nonpartisan candidate in a general or special election, the applicable date is the last day on which the candidate's application for a place on the ballot could be delivered to the appropriate officer for receiving the application.

"(3) For a write-in candidate, the applicable date is the day of the election at which the candidate's name is written in.

"(4) For a party nominee who is nominated by any method other than by primary election, the applicable date is the day on which the nomination is made.

"(5) For an appointee to an office, the applicable date is the day on which the appointment is made.

"Subdivision 2. The foregoing requirements do not apply to any office for which the Constitution or statutes of the United States or of this state prescribe the exclusive qualifications for the office or prescribe qualifications in conflict herewith, and in such case the provisions of such other laws control.

"Subdivision 3. A home-rule by charter may prescribe for its elective officers different age and residence requirements from those prescribed in Subdivision 1 of this section, but a charter may not set a minimum age greater than 21 years or a minimum length of residence in the state or city greater than 12 months next preceding the election.

"Subdivision 4. Except as provided in Section 104 of this code (Article 8.22, Vernon's Texas Election Code), no ineligible candidate shall ever have his name placed upon the ballot at any primary, general or special election. No ineligible candidate shall ever be voted upon nor have votes counted for him at any such primary, general or special election for the purpose of nominating or electing him but votes cast for an ineligible candidate shall be taken into account in determining whether any other candidate received the necessary vote for nomination or election.

"Subdivision 5. No person who advocates the overthrow by force or violence or change by unconstitutional means of the present constitutional form of government of the United States or of this state shall be eligible to have his name printed on any official ballot in any general, special or primary election in this state."

Sec. 2. The Texas Election Code is amended by adding Section 8b, to read as follows:

"8b. Verification of petition signatures

"Whenever an application or petition of a candidate or a political party for a place on the ballot, or any other instrument authorized or required by this code, contains more than 1,000 signatures or names which need verification, the officer with whom the instrument is filed (including officers of political parties as well as public officers) may employ any reasonable statistical sampling method in determining whether the instrument contains the required number of names meeting the prescribed qualifications for signers or for names which may be listed thereon. However, in no event may the sample be less than one percent of the total number of names appearing on the instrument."

Sec. 3. Section 33, Texas Election Code, as amended (Article 5.01, Vernon's Texas Election Code), is amended to read as follows:

"33. Classes of persons not qualified to vote

"The following classes of persons shall not be allowed to vote in this state:

"1. Persons under 18 years of age.

"2. Idiots and lunatics.

"3. All paupers supported by the county.

"4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned."

Sec. 4. Section 34, Texas Election Code, as amended (Article 5.02, Vernon's Texas Election Code), is amended to read as follows:

"34. Qualifications and requirements for voting

"Every person subject to none of the foregoing disqualifications who is a citizen of the United States and a resident of this state and is 18 years of age or older, and who has complied with the registration requirements of this code, is a qualified voter. No person may vote in an election held by a county, municipality, or other political subdivision unless he is a resident of the subdivision on the day of the election. The provisions of this section, as modified by Section 35 of this code (Article 5.03, Vernon's Texas Election Code), apply to all elections, including general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party."

Sec. 5. Subdivision 1, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), is amended to read as follows:

"**Subdivision 1. Who may vote absentee.** (a) Any qualified voter of this state who expects to be absent from the county of his residence on the day of the election, or who will be 65 years of age or older on the day of the election, or who because of sickness, physical disability, confinement in jail, or religious belief cannot appear at the polling place in the election precinct of his residence on the day of the election, may nevertheless cause his vote to be cast at any election held in this state by compliance with the applicable method herein provided for absentee voting. If a voter's religious belief prohibits him from voting during any part of the time during which the polls are open on the day of the

election, he shall nevertheless be entitled to vote absentee even though the prohibition does not operate throughout the entire time that the polls are open. A voter who is confined in jail is entitled to vote absentee if at the time of applying for an absentee ballot he is: (1) serving a misdemeanor sentence which extends through election day; (2) being held for trial after a denial of bail; (3) being held without bail pending the appeal of a felony conviction; or (4) being held for trial or pending an appeal on a bailable charge but he expects not to have been released on bail by the date of the election.

"(b) Absentee voting shall be conducted by two methods: (1) voting by personal appearance at the clerk's office, and (2) voting by mail. All voters coming within the foregoing provisions of this subdivision may vote by personal appearance at the clerk's office if they are able to make such appearance within the period for absentee voting. Where the ground for voting absentee is confinement in jail, it is not mandatory that the voter be allowed to make a personal appearance, but the officer in charge of the jail, in his discretion, is authorized to make the necessary arrangements to permit the voter to vote by personal appearance.

"(c) The following persons, and no other, may vote by mail:

"(i) Qualified voters who will be 65 years of age or older on the day of the election, or who because of sickness or physical disability, or because of religious beliefs, cannot appear at the polling place on the day of the election. The application for an absentee ballot shall be made not more than sixty days before the day of the election. It must be mailed to the clerk, and the clerk shall preserve the envelope in which it is received. If the application is delivered to the clerk by any method other than by mailing it to him, the ballot shall be void and

shall not be counted. The voter shall state in his application the address to which the ballot is to be mailed to him, which must be either his permanent residence address or the address at which he is temporarily living. If the ballot is furnished to the voter by any method other than by mailing it to him, or if it is mailed to any address other than one of the foregoing, it shall be void and shall not be counted. The marked ballot must be mailed to the clerk, and if returned in any other manner it shall be void and shall not be counted.

"(ii) Qualified voters who, before the beginning of the period for absentee voting, make application for an absentee ballot on the ground of expected absence from the county of their residence on election day, and who expect to be absent from the county during the clerk's regular office hours for the entire period of absentee voting. The voter must state in his application that he expects to be absent from the county of his residence on election day and during the clerk's regular office hours for the entire period for absentee voting. The application shall be made not more than sixty days before the day of the election, and may be mailed to the clerk or delivered to him by the voter in person, but the clerk shall not furnish a ballot to the voter by any method other than by mailing it to him. Applications made under this paragraph may be mailed either from within or without the county of the voter's residence, but in every case the ballot must be mailed to the voter at an address outside the county. The ballot shall not be counted unless the carrier envelope in which the ballot is returned to the clerk is postmarked from a point outside the county and the affidavit on the carrier envelope is certified by an officer other than an officer of the county of the voter's residence.

"(iii) Qualified voters who, after the beginning of the period for absentee voting, apply for an absentee ballot

on the ground of expected absence from the county and who are absent from such county at the time of applying for an absentee ballot and expect to be absent from such county during the clerk's regular office hours for the remainder of the period for absentee voting. The voter must state in his application that he is absent from the county at the time of making the application and expects to be absent on election day and during the clerk's regular office hours for the remainder of the period for absentee voting. The clerk shall not mail a ballot to any such voter unless the envelope in which the application is received is postmarked from a point outside the county, and the ballot must be mailed to the voter at an address outside the county. The ballot shall not be counted unless the envelope in which the application is received and the carrier envelope in which the ballot is returned to the clerk are each postmarked from a point outside the county and the affidavit on the carrier envelope is certified by an officer other than an officer of the county of the voter's residence.

"(iv) Qualified voters who are confined in jail under one of the circumstances listed in the first paragraph of this subdivision. The application for an absentee ballot shall be made not more than twenty days before the day of the election. It must be enclosed in an envelope and either mailed to the clerk or delivered to him by the jailer or one of his deputies or assistants, who shall place his signature on the envelope at the time of its delivery. The clerk shall preserve the envelope in which the application is received. If the application is delivered to the clerk by any method other than as expressly authorized herein, the ballot shall be void and shall not be counted. The clerk shall mail the ballot to the voter in care of the jail where he is confined; and if the ballot is furnished to the voter by any method other than by mailing it to him, or if it is mailed to any other address, it shall be void and shall not be counted. The marked ballot

must be mailed to the clerk, and if returned in any other manner it shall be void and shall not be counted.

"(d) An application for an absentee ballot to be voted by mail shall state the applicant's permanent address and the address to which the absentee ballot is to be mailed to the applicant, and shall also state the address to which his voter registration certificate is to be mailed back to him."

Sec. 6. Subdivision 2, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), is amended to read as follows:

"**Subdivision 2. Application for ballot.** (a) A voter desiring to vote absentee shall make written application for an official ballot to the county clerk of the county of his residence, which application shall be signed by the voter, or by a witness at the direction of the voter if for any reason the voter is unable to sign his name. The application shall state the ground on which the applicant is entitled to vote absentee, and in case of an application by mail, it shall also state the additional information required by Subdivision 1 of this section.

"(b) The application shall be accompanied by the voter registration certificate of the voter, or in lieu thereof, his statement in writing that same has been lost or mislaid, has been left at the voter's home (where he is applying from a temporary address), or has been used for applying for an absentee ballot in another election (stating the nature and date of the election) and has not been returned to him. If the ground of application is sickness or physical disability by reason of which the voter cannot appear at the polling place on election day, a certificate of a duly licensed physician or chiropractor or accredited Christian Science practitioner certifying to such sickness or physical disability shall accompany

the application, which certificate shall be in substantially the following form:

"This is to certify that I have personal knowledge of the physical condition of _____, and that because of sickness or physical disability he (she) will be unable to appear at the polling place for an election to be held on the ____ day of _____, 19__.

Witness my hand at _____, Texas, this ____ day of _____, 19__.

_____
(Signature of Practitioner)

"(c) Expected or likely confinement for childbirth on election day shall be sufficient to entitle a voter to vote absentee on the ground of sickness or physical disability, and a physician executing a certificate for a pregnant woman may state in the certificate that because of pregnancy and possible delivery she will be or may be unable to appear at the polling place on election day.

"Any person who requests a physician, chiropractor, or Christian Science practitioner to execute a certificate for another person without having been directed by such other person to do so, and any physician, chiropractor, or Christian Science practitioner who knowingly executes a certificate except upon the request of the voter named therein or upon request of someone at the voter's direction, or who knowingly delivers a certificate except by delivering it to the voter in person or by mailing it to the voter at his permanent residence address or the address at which he is temporarily living, or who knowingly falsifies a certificate, is guilty of a misdemeanor and upon conviction shall be fined not more than Five Hundred Dollars or imprisoned in the

county jail for not more than thirty days, or both so fined and imprisoned.

"(d) A voter who gives false information in his application for an absentee ballot is guilty of a misdemeanor and upon conviction shall be punished as provided in Section 347 of this code (Article 15.47, Vernon's Texas Election Code). Printed application forms furnished to voters by the county clerk shall contain the following statement immediately preceding the space for the voter's signature: 'I certify that the information given in this application is true, and I understand that the giving of false information in the application is a crime.' An informal application need not contain the statement, but a voter who gives false information is subject to the criminal penalty regardless of whether the statement appears on the application."

Sec. 7. Subdivision 3a, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), is amended to read as follows:

"Subdivision 3a. Voting by personal appearance in county-wide elections. (a) In a county-wide election, or in an election less than county-wide where the authority holding the election has provided that absentee voting by personal appearance shall be conducted on a voting machine or that absentee paper ballots shall be counted by a special canvassing board, upon receipt of an application for an absentee ballot to be voted by personal appearance, if the clerk is satisfied as to the right of the applicant to vote, the clerk shall place a notation on the list of registered voters showing that the particular person has voted absentee and shall enter the voter's name on a poll list of absentee voters. He shall note the number of the voter's registration certificate on the application, and shall return the

certificate to the voter. The application shall be preserved in the clerk's office for the length of time provided by law for preservation of voted ballots.

"(b) In the conduct of absentee voting under this subdivision, the clerk shall possess the same power as a presiding judge with respect to examination and acceptance of a voter. If the right of an applicant to vote is challenged, the procedure prescribed in Section 91 of this Code (Article 8.09, Vernon's Texas Election Code) shall be followed.

"(c) Where paper ballots are used for absentee voting, after a voter has been accepted, the clerk shall furnish the voter with an official ballot which has been prepared in accordance with law for use in such election. The voter shall then and there, in the office of the clerk, mark his ballot and detach and sign the ballot stub, and shall deposit the ballot in a ballot box and the stub in a stub box in the manner provided in Section 97 of this Code (Article 8.15, Vernon's Texas Election Code). The ballots shall be deposited in a ballot box locked with two locks, the keys of one of which shall be kept during the period for absentee voting by the sheriff and the keys of the other by the county clerk. The stubs shall be deposited in a stub box prepared in accordance with Section 97 of this Code (Article 8.15, Vernon's Texas Election Code).

"(d) Where a voting machine is used for absentee voting by personal appearance, after a voter has been accepted, he shall then be permitted to cast his ballot on the voting machine. Returns of absentee votes cast on a voting machine shall be made under the appropriate provision of Section 79 of this Code (Article 7.14, Vernon's Texas Election Code)."

Sec. 8. Subdivision 3b, Section 37, Texas Election

Code, as amended (Article 5.05, Vernon's Texas Election Code), is amended to read as follows:

"Subdivision 3b. Voting by personal appearance in election less than county-wide. (a) In an election less than county-wide in which absentee paper ballots are to be sent to the regular polling places for counting, upon receipt of an application for an absentee ballot to be voted by personal appearance, the clerk shall thereupon furnish to the voter the following absentee voting supplies:

"(1) One official ballot which has been prepared in accordance with law for use in such election.

"(2) One ballot envelope, which shall be a plain envelope, without any markings except the words 'Ballot Envelope' printed on the face thereof, followed by the instructions contained in this subdivision and Subdivision 4 for marking the ballot, for placing it in the carrier envelope, and for returning a ballot to be voted by mail, together with a statement of the deadline for placing the ballot in the mail and for delivery to the clerk's office in that election, the text of the provisions in Subdivision 15 of this section which relate to assistance to the voter in preparing his ballot, and the text of Section 330 of this code (Article 15.30, Vernon's Texas Election Code). The textual material may be continued onto the reverse side of the envelope if necessary.

"(3) One carrier envelope, upon the face of which there shall appear the words 'Carrier Envelope for Absentee Ballot' and the name, official title, and post-office address of the county clerk, and upon the other side there shall appear spaces for showing the nature and date of the election and the number or name of the election precinct in which the voter resides (which the clerk shall fill in before he furnishes the supplies to the

voter), and a certificate in substantially the following form:

" 'I certify that the enclosed ballot expresses my wishes, independent of any dictation or undue persuasion of any person and that I did not use any memorandum or device to aid me in the marking of the ballot.

_____
(Signature of voter)

By: _____
(Signature of person who assisted voter. See Ballot Envelope for restrictions and penalties.)

"(b) The voter shall then and there, in the office of the clerk, mark the ballot, sign his name on the back of the ballot stub, detach the stub from the ballot, fold the ballot and place it in the envelope marked 'Ballot Envelope' and seal the same. The voter shall then place the stub and the ballot envelope in the carrier envelope, seal the same and sign the certificate on the carrier envelope, and deliver the carrier envelope to the clerk. The clerk shall note the number of the voter's registration certificate on the application, and shall return the certificate to the voter."

Sec. 9. Subdivision 4, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), is amended to read as follows:

"Subdivision 4. Voting by mail. (a) The period for absentee voting by mail shall begin on the twentieth day preceding the date of the election. An application for an absentee ballot to be voted by mail must be received in the clerk's office not later than the close of business on

the fourth day preceding election day. In county-wide elections and in elections less than county-wide where the authority holding the election has provided that absentee ballots shall be counted by a special canvassing board, the marked ballot must be received in the clerk's office before one o'clock p.m. on election day, except that in an election in which the offices of president and vice president of the United States appear on the ballot, the deadline for receipt of the ballot in the clerk's office is the official time of closing of the polls on the day of the election. In all other elections which are less than county-wide, the marked ballot must be received in the clerk's office before ten o'clock a.m. on the second day preceding election day. The ballot may be marked by the voter at any time after he receives it.

"(b) On the twentieth day preceding election day, or as soon thereafter as possible, the clerk shall mail an official ballot, ballot envelope, and carrier envelope, as described in Subdivision 3b of this section, to each voter who has theretofore made application for a ballot in compliance with this section. On applications which are received between the twentieth day and the fourth day preceding election day, the clerk shall forthwith mail the absentee voting supplies to the voter.

"(c) The voter shall mark the ballot, sign his name on the back of the ballot stub, detach the stub from the ballot, fold the ballot, and place it in the envelope marked 'Ballot Envelope' and seal the same. The voter shall then place the stub and the ballot envelope in the carrier envelope, seal the same and sign the certificate on the carrier envelope. The carrier envelope shall then be mailed, postage prepaid, to the county clerk.

"(d) As soon as practicable after receipt of the carrier envelope containing the marked ballot, the clerk shall note the number of the voter's registration certificate on

the application, and shall mail the certificate to the voter at the address given in the application for returning the certificate to the voter, or if no such address is given, to the voter's permanent address."

Sec. 10. Paragraphs (a) and (b) of Subdivision 6, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), are amended to read as follows:

"(a) In all countywide elections, and in elections less than county wide where the authority holding the election has provided that absentee paper ballots shall be counted by a special canvassing board, on the day of the election the ballot box and stub box used for absentee voting by personal appearance, the keys to the ballot box, the jacket envelopes containing the ballots voted by mail and accompanying papers, the poll list for absentee voting on which the clerk has entered the names of persons voting by personal appearance, and the list of registered voters used by the county clerk, shall be delivered to a special canvassing board consisting of a presiding judge and two or more election clerks appointed in the same manner as provided for appointment of the election officers for regular polling places at that election. The county clerk shall deliver the ballots to the canvassing board at such hour as the presiding judge shall direct, but not earlier than the hour at which the polls are opened and not later than the hour specified in Subdivision 4 of this section as the deadline for returning the marked ballots to the clerk's office. If delivered before the deadline, the clerk shall deliver in like manner to the board, immediately following the deadline, all ballots received by mail before the deadline which have not previously been delivered to the board.

"(b) This special canvassing board shall open the

jacket envelopes, announce the voter's name, and ascertain in each case if he is qualified to vote at that election and if he has complied with all applicable provisions of this section to entitle his ballot to be cast. On ballots voted by mail, the board shall compare the signatures on the application and the carrier envelope, and in case the board finds that the signatures correspond, that the application and the certificate on the carrier envelope are duly executed, that the voter is a qualified elector, and that he has voted in a manner authorized in this section, they shall enter his name on the official poll list (on which voters voting by mail shall be listed separately from those who have voted by personal appearance) and shall open the carrier envelope so as not to deface the certificate thereon, and shall place the sealed ballot envelope in the ballot box and the stub in the stub box. The carrier envelope, application, and accompanying papers shall be replaced in the jacket envelope and returned to the county clerk at the same time the voted ballots are returned, and shall be preserved for the length of time provided by law for the preservation of the voted ballots."

Sec. 11. Subdivision 15, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), is amended to read as follows:

"**Subdivision 15. Assistance to voter; use of English language.** (a) No assistance shall be given a voter in marking his absentee ballot except where the voter is unable to prepare the same himself because of his inability to read the language in which the ballot is printed or because of some bodily infirmity which renders him physically unable to write or to see or to operate the voting equipment. If a voter who is voting by personal apperance is entitled to assistance, he may be assisted by the clerk or a deputy clerk or by any qualified voter of the political subdivision in which the

election is held, selected by the voter. If a voter who is voting by mail is entitled to assistance he may be assisted by any person 18 years of age or older, selected by the voter. The person assisting the voter shall not suggest, by word or sign or gesture, how the voter shall vote, and shall confine the assistance to answering the voter's questions, to stating the propositions to be voted on, and to naming the candidates and the political parties to which they belong, and the person shall prepare the ballot as the voter directs. Where any assistance is rendered in marking an absentee ballot other than as allowed in this subdivision, the ballot shall not be counted but shall be void for all purposes.

"(b) In absentee voting by personal appearance at the clerk's office, any voter unable to speak or understand the English language may communicate with the clerk in some other language, and if the clerk is unable to speak or understand the language used by the voter or if he requests that the voter communicate through an interpreter, the voter shall be entitled to communicate through an interpreter of his choice, who shall be a qualified voter in the county. Before acting as interpreter, the person chosen by the voter shall take the following oath, to be administered by the clerk: 'I solemnly swear that I will correctly interpret and translate each question, answer, or statement addressed to the voter by the clerk and each question, answer, or statement addressed to the clerk by the voter.' When any language other than the English language is used either by the voter or by the clerk, any watcher present shall be entitled to request and receive a translation into the English language of anything spoken in some other language."

Sec. 12. Section 37b, Texas Election Code (Article 5.05b, Vernon's Texas Election Code), is amended to read as follows:

"37b. Voting by former residents of state in presidential elections

"Subdivision 1. Former residents eligible to vote. A former resident of this state who has become a legal resident of another state of the United States or of the District of Columbia may vote for presidential and vice presidential electors in the county of his former residence if:

"(1) on the day of the election he will not have resided in the state of his present residence for a period of 30 days and will not be eligible to vote in that state, and

"(2) he otherwise possesses the substantive qualifications of an elector in this state, as defined in Section 34 of this code (Article 5.02, Vernon's Texas Election Code), except the requirement of residence, and

"(3) at the time of his removal he was registered as a voter in this state, and

"(4) he complies with the provisions of this section.

"Subdivision 2. Application for presidential ballot. (a) A person eligible to vote under the provisions of this section may vote either by personal appearance or by mail. The voter shall make a written, signed application to the county clerk of the county of his former residence for a ballot permitting him to vote for president and vice president only, on a form to be prescribed by the secretary of state and furnished by the county clerk.

"Subdivision 3. Procedure for voting by mail. When a voter desires to vote a ballot by mail, the procedure for absentee voting by mail in a countywide election shall be followed insofar as it can be made

applicable and is not inconsistent with this section. The clerk shall mail the voter a ballot from which the clerk has stricken all offices and propositions other than the offices of president and vice president, together with a ballot envelope and a carrier envelope containing such markings and instructions as the secretary of state prescribes. When the election officer checks the voter's name on the list of registered voters and enters his name on the poll list, the officer shall add a notation that the voter is voting under this section, in the presidential race only. The ballots cast under this section shall be counted and return made thereof along with and on the same forms as the other absentee ballots.

"Subdivision 4. Procedure for voting by personal appearance. A voter may vote by personal appearance at the clerk's office at any time that the office is open to the public, beginning on the 20th day preceding the election and ending on the day of the election. When the voter appears in person, the clerk shall furnish him with a ballot, ballot envelope, and carrier envelope prepared in accordance with Subdivision 3 of this section, and the ballot shall be processed and counted along with the absentee ballots voted by mail.

"Subdivision 5. Cancellation of registration. When the registrar receives a list of registered voters containing a notation that a voter has voted under this section, he shall cancel the registration if it is still in the active file in his records."

Sec. 13. Section 37d, Texas Election Code (Article 5.05d, Vernon's Texas Election Code), is amended to read as follows:

"37d. General provisions on voting by persons lacking full voting rights

"Subdivision 1. Lists of applicants to be posted. The

county clerk shall post at a conspicuous place in his office, for public inspection, a complete list of persons who have applied for a ballot under Section 37b or 37c of this code (Article 5.05b or 5.05c, Vernon's Texas Election Code), stating thereon the applicant's name, address, precinct of residence, the section of this code under which the application was made, and the date on which the ballot was delivered or mailed, which list shall be kept up from day to day. The names of persons voting under Section 37c shall be included on the precinct lists of absentee voters which the clerk furnishes to the presiding judges of the election, as provided in Subdivision 11 of Section 37 of this code (Article 5.05, Vernon's Texas Election Code), with a notation by each name to indicate that the voter received a limited ballot under Section 37c.

"Subdivision 2. Preservation of applications; inspection. Applications and accompanying papers received pursuant to Sections 37b and 37c of this code (Articles 5.05b and 5.05c, Vernon's Texas Election Code) shall be preserved in the clerk's office for the length of time provided by law for preservation of voted ballots and shall be open to public inspection under the same rules as apply to applications for absentee ballots."

Sec. 14. Section 57, Texas Election Code, as amended (Article 6.01, Vernon's Texas Election Code), is amended to read as follows:

"57. Official ballot

"In all elections by the people, the vote shall be by official ballot, which shall be numbered and elections so guarded and conducted as to detect fraud and preserve the purity of the ballot. No ballot shall be used in voting at any general, primary or special election held to elect public officers, select candidates for office or determine

questions submitted to a vote of the people, except the official ballot, unless otherwise authorized by law. At the top of the official ballot shall be printed in large letters the words 'Official Ballot.' It shall contain the printed names of all candidates whose nominations for an elective office have been duly made and properly certified. The names shall appear on the ballot under the head of the party that nominates them, except as otherwise provided by this Code. No name shall appear on the official ballot except that of a candidate who was actually nominated (either as a party nominee or as a non-partisan or independent candidate) in accordance with the provisions of this Code. The name of no candidate shall appear more than once upon the official ballot, except (a) as a candidate for two or more offices permitted by the Constitution to be held by the same person; or (b) when a candidate has been duly nominated for the office of President or Vice-President of the United States and also for an office requiring a statewide vote for election. The name of no candidate of any political party that cast 20 percent or more of the votes for governor at the last preceding general election for that office shall be printed on any official ballot for a general election, unless nominated by primary election, on primary election day, except as otherwise provided in this code."

"Sec. 15 Section 61b, Texas Election Code (Article 6.05b, Vernon's Texas Election Code), is amended to read as follows:

"61b. Order of party columns on the ballot

"In any election held at the expense of the county, in which party columns appear on the official ballot, the columns shall be arranged in the following order, beginning on the left-hand side of the balot: (1) columns of parties with state organization which have nominated

candidates to be voted on at the election, arranged in the order of the number of votes cast throughout the state for each party's candidate for Governor at the last preceding general election for that office, with the party whose candidate for Governor received the highest vote being placed in the first column; (2) columns of parties without state organization which have nominated candidates to be voted on at the election; (3) a column for independent candidates; (4) a column for write-in candidates. If there is no independent or nonpartisan candidate whose name is to be printed on the ballot, the column for independent candidates shall be omitted.

"Where voting machines are used in the election and the columns on the ballot are arranged horizontally, the columns shall appear on the ballot in the order herein provided, beginning at the top of the ballot instead of on the left-hand side."

Sec. 16 Subdivisions 2 and 2a, Section 63, Texas Election Code, as amended (Article 6.07, Vernon's Texas Election Code), are amended to read as follows:

"Subdivision 2. A notice of each proposed constitutional amendment shall be published, under the authority of the Secretary of State, as required by Section 1, Article XVII, Constitution of Texas. The Secretary of State shall contract with the eligible newspapers for the publication of the notices; shall furnish affidavit forms, in duplicate, to be executed by the owner, editor or publisher of the newspaper, when two publications have been made; shall furnish one approved copy of each executed affidavit to the Comptroller, who shall then authorize the Treasurer to issue a warrant in the amount specified. Executed affidavits must be returned from the owner, editor, or publisher of the newspaper to the Secretary of State within 30 days from the date of the last publication; unless this time limit is observed,

the Secretary of State shall refrain from approving affidavits for payment. Provided, however, if the Secretary of State deems it more expeditious or economical, he may make a written contract with any state-wide association of daily and weekly newspapers in Texas for the publication of the notices of such constitutional amendments in newspapers eligible to publish them. Such association shall cause such notices to be published in the eligible newspapers in the manner required by the Constitution; shall furnish such materials as are necessary for a correct and uniform publication of such notices; shall furnish affidavit forms, in duplicate, to such newspapers, to be executed by the owner, editor, or publisher thereof, when two publications have been made; shall make an itemized report to the Secretary of State showing the names of all the newspapers in which such notices were published, the number of column inches submitted to each publication, the cost of publication in each newspaper, together with a clipping for such newspaper, and any other information desired by the Secretary of State pertaining to such task; shall return within 30 days from the date of the last publication all affidavits executed by the owner, editor, or publisher of such newspapers, together with an affidavit executed in duplicate by the general manager of such association that the notices have been published by said newspapers as required by the Constitution, to the Secretary of State, who shall, after satisfying himself as to the proper publication of such notices, furnish one approved copy of the executed affidavit of the general manager of the association to the Comptroller, who shall authorize the Treasurer to issue a warrant in the amount specified to the association. The Comptroller and Treasurer shall forthwith perform their duties in this connection, so that undue length of time shall not elapse between publication and payment therefor. The Legislature shall appropriate a sufficient

fund for such publication, such fund to be estimated by the Secretary of State.

"Subdivision 2a. (a) Where the Secretary of State contracts directly with the newspapers for publication of notices of proposed constitutional amendments, each newspaper which publishes a notice is entitled to be paid for the publication an amount computed at the rate of 85 percent of the newspaper's published national rate for advertising per column inch if the Secretary of State furnishes to the newspaper a copy of the notice in the form of a camera-ready paste-up proof, a matrix, or a printing plate, and an amount computed at the full rate of the newspaper's published national rate for advertising per column inch if the Secretary of State does not furnish a copy of the notice in that form.

"(b) Where the Secretary of State contracts with a state-wide association of newspapers for the publication of the notices, the association is entitled to be paid an amount equal to the sum of the cost of publication in each newspaper, computed at the full rate of each newspaper's national rate for advertising per column inch. The commission retained by the association shall be on a percentage basis uniformly applied to all newspapers, and the percentage shall be stipulated in the contract between the Secretary of State and the association."

Sec. 17 Section 15 of Section 79, Texas Election Code, as amended (Article 7.14, Vernon's Texas Election Code), is amended to read as follows:

"**Sec. 15. Manner of Voting.** But one voter shall be admitted at a time, and no voter shall be permitted to keep the curtain of the machine closed longer than two minutes. However, if a voter is unable to read the language in which the ballot is printed or if because of some bodily infirmity he is physically unable to operate

the machine or to see, he may be assisted by two election officials, or by a person selected by the voter, who shall operate the machine so as to vote the ballot in accordance with the voter's wishes, and he shall be permitted to keep the curtain of the machine closed no longer than five minutes. The provisions of Section 95 of this Code shall govern the assistance rendered under this section insofar as they can be made applicable."

Sec. 18. Paragraph (c), Section 18 of Section 79, Texas Election Code, as amended (Article 7.14, Vernon's Texas Election Code), is amended to read as follows:

"(c) If the machine is provided with a device which produces a printed record of the numbers registered on the counters, the procedure outlined herein shall be followed in lieu of the procedure set out above for preparation of the statements of canvass. The presiding judge, in the presence of at least two clerks and two watchers of opposed interest (if such there be) and of any other person lawfully present who wishes to observe, shall take the necessary steps to secure a printed record from each machine. Ample opportunity shall be given to all persons lawfully entitled to be present at the polling place to examine the printed record. The printed record shall then be signed by the presiding judge and two clerks and by two watchers of opposed interest (if such there be), certifying that the printed record was obtained from the machine designated thereon, and the certified printed record shall constitute the official statement of canvass for that machine."

Sec. 19. Subdivision 14, Section 80, Texas Election Code (Article 7.15), Vernon's Texas Election Code), is amended to read as follows:

"**Subdivision 14. Assistance to voter.** If a voter is

unable to read the language in which the ballot is printed or if because of some bodily informity he is physically unable to operate the voting equipment or to see, he may be assisted by two election officers, or by a person selected by the voter, who shall mark the ballot in accordance with the voter's wishes. The provisions of Section 95 of this code govern the assistance rendered insofar as they can be made applicable."

Sec. 20. Section 95, Texas Election Code, as amended (Article 8.13, Vernon's Texas Election Code), is amended to read as follows:

"95. Aid to voter

"Subdivision 1. Not more than one person at the same time shall be permitted to occupy any one compartment, voting booth or place prepared for a voter, nor shall any assistance be given a voter in preparing his ballot, except when a voter is unable to prepare the same because of the voter's inability to read the language in which the ballot is printed or because of some bodily infirmity which renders the voter physically unable to write or to see, in which case two officers of such election shall assist the voter (with the aid of an interpreter, when necessary), they having first sworn that they will not suggest, by word or sign or gesture, how such voter shall vote; that they will confine their assistance to answering the voter's questions, to stating the propositions to be voted on, and to naming candidates and the political parties to which they belong; and that they will prepare the voter's ballot as such voter directs. If the election is a general election, the election officers who assist such voters shall be of different political parties, if there be such officers present. One or more watchers may be present when the assistance herein permitted is being given by election officers, but each watcher must remain silent except in cases of

irregularity or violation of the law.

"Subdivision 2. Instead of being assisted by two election officers as hereinabove provided, a voter who is entitled to assistance may select any qualified voter residing in the precinct to assist him, and no other person shall be permitted to be present while the ballot is being prepared. Before assisting the voter, the person selected shall take the following oath, which shall be administered by one of the election officers: 'I solemnly swear that I will not suggest, by word or sign or gesture, how the voter shall vote; I will confine my assistance to answering the voter's questions, to stating propositions to be voted on and to naming candidates and the political parties to which they belong; and I will prepare the voter's ballot as the voter directs.'

"Subdivision 3. Where any assistance is rendered in preparing a ballot other than as herein allowed, the ballot shall not be counted, but shall be void for all purposes."

Sec. 21. Subdivision 2, Section 222, Texas Election Code, as amended (Article 13.45, Vernon's Texas Election Code), is amended to read as follows:

"**Subdivision 2. Parties receiving less than two percent of vote for governor.** (a) Any political party whose nominee for governor received less than two percent of the total votes cast for governor in the last preceding general election for that office, or any new party, or any previously existing party which did not have a nominee for governor in the last preceding general election for that office, may nominate candidates by conventions as provided in Sections 224 and 225 of this code, but in order to have the names of its nominees printed on the general election ballot there must be filed with the secretary of state, within 30 days

after the date for holding the party's state convention, the lists of participants in precinct conventions held by the party in accordance with Sections 222a and 224 of this code, signed and certified by the temporary chairman of each respective precinct convention, listing the names, addresses (including street address or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions in an aggregate number of at least one percent of the total votes cast for governor at the last preceding general election for that office; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election for that office. The address and registration certificate number of each signer shall be shown on the petition. No person who, during that voting year, has voted at any primary election or participated in any convention of any other party shall be eligible to sign the petition.

"(b) To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: 'I know the contents of the foregoing petition, requesting that the names of the nominees of the _____ Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party, and I will not vote in a primary election or participate in a convention of any other party during the remainder of this voting year.' The petition may be

in multiple parts. One certificate of the officer administering the oath may be so made as to apply to all to whom it was administered. The petition may not be circulated for signatures until after the date of the party's precinct conventions. Any signatures obtained on or before that date are void.

"(c) Any person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year, or any person who votes in a primary election or participates in a convention of any other party during the same voting year after having signed the petition, is guilty of a misdemeanor and upon conviction shall be fined not less than $100 nor more than $500.

"(d) The chairman of the state executive committee shall be responsible for forwarding the precinct lists and petition to the secretary of state.

"(e) At the time the secretary of state makes his certifications to the county clerks as provided in Section 3 of this code, he shall also certify to the county clerk the names of parties subject to this subdivision which have complied with its requirements, and the county clerks shall not place on the ballot the names of any nominees of such a party which have been certified directly to them unless the secretary of state certifies that the party has complied with these requirements."

"Sec. 22. Section 4 of Section 224a, Texas Election Code, as amended (Article 13.47a, Vernon's Texas Election Code), is amended to read as follows:

"Sec. 4. The requirements of Section 1 do not apply to candidates for unexpired terms where the vacancy in office occurs subsequent to the tenth day preceding the regular deadline for filing applications for a place on a primary election ballot as prescribed in Paragraph 2 of

Section 190 of this code (Article 13.12, Vernon's Texas Election Code),"

Sec. 23. Section 227, Texas Election Code, as amended (Article 13.50, Vernon's Texas Election Code), is amended to read as follows:

"227. Nonpartisan or independent candidate

"Subdivision 1. This section applies to nonpartisan or independent candidates for federal, state, district, county, and precinct offices in the general election provided for in Section 9 of this code (Article 2.01, Vernon's Texas Election Code). A person may run as a nonpartisan or independent candidate for any such office, other than the offices of president, vice president, and presidential elector, by complying with this section and other applicable provisions of this code.

"Subdivision 2. (a) As a condition precedent to having a candidate's name printed on the official ballot as an independent candidate under this section, in addition to the application required by Subdivision 3 of this section, the person must file, by the deadline provided in Section 190 of this code (Article 13.12, Vernon's Texas Election Code), a declaration of his intent to run as an independent candidate. The declaration shall state the person's name, occupation, county of residence, post office address, age, and the office for which he intends to run, and shall be signed and duly acknowledged by the person desiring to be a candidate. It shall be filed with the officer with whom the application required by Subdivision 3 of this section is filed.

"(b) The requirements of Paragraph (a) of this subdivision do not apply to candidates for unexpired terms where the vacancy in office occurs subsequent to the tenth day preceding the regular deadline for filing application for a place on a primary election ballot as

prescribed in Section 190 of this code (Article 13.12, Vernon's Texas Election Code), and do not apply to candidates for any office for which the filing deadline in a primary election is extended under the provisions of Paragraph 2a of Section 190. However, an independent candidate who is not required to file a declaration of intent under Paragraph (a) of this subdivision must file with the secretary of state or the county judge, as the case may be, his written consent to become a candidate, within 30 days after the second primary election day.

"Subdivision 3. The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the proper officer, as herein provided, and delivered to him within 30 days after the second primary election day, as follows:

"If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding gubernatorial general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of more than one county, the application shall be signed by three percent of the entire vote cast for Governor in such district at the last preceding gubernatorial general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of only one county or part of one county, the application shall be signed by five percent of the entire vote cast for Governor in such district at the last preceding gubernatorial general election, and shall be addressed to the Secretary of State.

"if for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding gubernatorial general election, and shall be addressed to the county judge.

"If for a precinct office, the application shall be signed by five percent of the entire vote cast for Governor in such precinct at the last preceding gubernatorial general election, and shall be addressed to the county judge.

"Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed 500.

"Subdivision 4. No application shall contain the name of more than one candidate. No person shall sign the application of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for an office for which a nomination was made at either such primary election.

"Subdivision 5. In addition to the person's signature, the application shall show each signer's address, the number of his voter registration certificate, and the date of signing.

"Subdivision 6. Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be

cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office."

Sec. 24. Section 229, Texas Election Code, as amended (Article 13.52, Vernon's Texas Election Code), is amended to read as follows:

"229. Consent to run

"Upon receipt of an application which conforms to the above requirements, the Secretary of State shall issue his instruction to the county clerks of the state or of the district, as the case may require, and the county judge shall issue his instruction to the county clerk of the county, directing that the name of the candidate in whose favor the application is made shall be printed on the official ballot in the independent column under the title of the office for which he is a candidate; provided, that any candidate who is required by Subdivision 2, Section 227 of this code (Subdivision 2, Article 13.50, Vernon's Texas Election Code) to file a statement of intent to become an independent candidate must have filed such statement in compliance with the provisions of that subdivision, and any candidate not required to file such statement must file with the Secretary of State or the county judge, as the case may be, his written consent to become a candidate,within 30 days after the second primary election day."

Sec. 25. Section 231, Texas Election Code (Article 13.54, Vernon's Texas Election Code) is amended to read as follows:

"231. Nominations by parties without state organization

"Any political party without a state organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor by a county convention held on the second Saturday in May of the election year, which convention shall be composed of delegates from the various election precincts in the county, elected therein at conventions held in such precincts on the first Satuday in May. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge not later than June 30 following the conventions, signed by qualified voters of the county equal in number to at least three per cent of the entire vote cast for governor in such county at the last general election for that office. No person who is affiliated with any other political party is eligible to sign the application. The application shall contain the following information with respect to each person signing it: his address, the number of his voter registration certificate, and the date of signing. The application may not be circulated for signatures until after the date of the precinct conventions, and any signatures obtained on or before that date are void. The application may be in multiple parts. To each part there shall be attached an affidavit of the person who circulated it, who must be a registered voter in the county, stating that he witnessed the affixing of each signature, that the correct date of signing is shown on the application, and that to his best knowledge and belief each signature is the genuine signature of the person whose name is signed. An application so verified is prima facie evidence that the signatures thereon are genuine and that the persons signing it are qualified voters of the county."

Sec. 26. The Texas Election Code is amended by adding Section 246A, to read as follows:

"246A. Misleading use of office title

"(a) It is unlawful for any candidate for nomination or election to a public office which is regularly filled at the general election for state and county officers to use the title of the office he seeks in his political advertising when the use of such title could reasonably be construed to lead the voters to believe that the candidate is the holder of the office sought, unless the candidate is the holder of the office at the time the representation is made.

"(b) It is unlawful for any person to print, publish, or broadcast any political advertising, or to make any written or oral commercial communication, relating to the campaign of a candidate for nomination or election to a public office which is regularly filled at the general election for state and county officers which states, implies, or otherwise represents that the candidate is the holder of the office sought, unless the candidate is the holder of the office at the time the representation is made.

"(c) A violation of this section is a Class A misdemeanor."

Sec. 27. Section 330, Texas Election Code (Article 15.30, Vernon's Texas Election Code), is amended to read as follows:

"330. Aid to voter

"Any judge or clerk at an election or any other person who assists any voter to prepare his ballot except when a voter is unable to prepare the same himself because of his inability to read the language in which the ballot is printed or because of some bodily infirmity which

renders him unable to write or to see or to operate the voting equipment, or who in assisting a voter in the preparation of his ballot prepares the same otherwise than as the voter directs, or who suggests by word or sign or gesture how such voter shall vote, shall be fined not less than two hundred dollars nor more than five hundred dollars or be confined in jail for not less than two nor more than twelve months, or both."

Sec. 28. The following portions of the Texas Election Code are repealed: Section 37a (Article 5.05a), relating to voting by new residents of the state in presidential elections; Section 39 (Article 5.07), relating to residence requirements and other qualifications for voting in city elections; Subsection (m), Section 40 (Article 5.08), relating to the residence of persons under 21 years old; Subdivision 1. Section 222a (Article 13.45a), relating to management of party affairs of certain minor political parties; Section 223 (Article 13.46), relating to nomination procedures for certain minor parties; and Section 3, Section 224a (Article 13.47a), relating to candidacy procedures for certain independent candidates. Chapter 793, Acts of the 62nd Legislature, Regular Session, 1971 (Article 1.05—1, Vernon's Texas Election Code), relating to eligibility for elective municipal offices, is also repealed.

Sec. 29. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Supreme Court, U. S.
FILED
NOV 17 1977
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-586

* * *

EUGENE J. McCARTHY, ET AL.,
Petitioners

V.

DOLPH BRISCOE, ET AL.,
Respondents

* * *

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

DON GLADDEN
702 Burk Burnett Bldg.
Fort Worth, Texas 76102

November 16, 1977

PETITIONERS' REPLY BRIEF

This brief is directed solely to the paragraph beginning on the bottom of page 3 of Respondents' Brief in Opposition to The Petition For A Writ of Certiorari. The legal issue in #A-201 was joined by the respondents' filing of their 10-page "Response to Application for Partial Stay" on the 10th day of September, 1976. New material filed in #A-247 pertained only to resolution of the jurisdictional question.

Although this matter has little, if any, to do with this Petition for Writ of Certiorari, the gross misstatement and untruth sold to the circuit court (see p. A-14, Petition for Writ of Certiorari) and again blatantly asserted here suggesting casual or questionable propriety of Mr. Justice Powell in his actions in granting temporary injunctive relief may not be allowed to stand without at least a note of resentment expressed by the undersigned.

Respectfully Submitted,

DON GLADDEN

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Counsel for Petitioners